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EDITOR'S NOTE

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o. 84-1979-CFX
tatus: GRANTED

ocketed:
une 21, 1985

Title: Meritor Savings Bank, FSB, Petitioner
v.
Mechelle Vinson, et al.

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Troll Jr., F. Robert

Counsel for respondent: Barry, Patricia Joan, Meisburg Jr., Jonn Marshall

ntry	Date	Note	Proceedings and Orders
1	Apr 12 1985		Application for extension of time to file petition and order granting same until June 24, 1985 (Chief Justice, April 17, 1985).
2	Jun 21 1985	G	Petition for writ of certiorari filed.
3	Jun 21 1985		Appendix of petitioner PSFS Savings Bank filed.
5	Jul 22 1985		Order extending time to file response to petition until August 21, 1985.
6	Aug 21 1985		Order further extending time to file response to petition until August 26, 1985.
7	Aug 27 1985		Brief of respondent Mechelle Vinson in opposition filed.
8	Aug 28 1985		DISTRIBUTED. September 30, 1985
9	Sep 3 1985	X	Reply brief of petitioner PSFS Savings Bank filed.
10	Oct 7 1985		Petition GRANTED.
			**********
12	Nov 5 1985		Order extending time to file brief of petitioner on the merits until December 11, 1985.
15	Dec 2 1985		Record filed.
16	Dec 11 1985		Joint appendix filed.
17	Dec 11 1985		Brief of petitioner PSFS Savings Bank filed.
18	Dec 11 1985		Brief amicus curiae of Equal Employment Advisory Council filed.
19	Dec 11 1985		Brief amicus curiae of Boston University filed.
20	Dec 11 1985	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
22	Dec 11 1985		Brief amicus curiae of EEOC filed.
24	Dec 21 1985		Order extending time to file brief of respondent on the merits until February 7, 1986.
25	Jan 13 1986		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
26	Jan 30 1986		Order further extending time to file brief of respondent on the merits until February 11, 1986.
27	Feb 4 1986		SET FOR ARGUMENT, Tuesday, March 25, 1986. (1st case)
28	Feb 10 1986		Brief amicus curiae of Women's Bar Association, et al. filed.
29	Feb 10 1986		Brief amicus curiae of New Jersey, et al. filed.
30	Feb 11 1986		Brief amicus curiae of Women's Bar Association of the State of New York filed.
31	Feb 11 1986		Brief amicus curiae of Women's Legal Defense Func, et al. filed.

APP

o. 84-1979-CFX

ntry	Date	Note	Proceedings and Orders
32	Feb 11 1986		Brief amicus curiae of Members of Congress filed.
33	Feb 11 1986		Brief of respondent Mechelle Vinson filed.
34	Feb 11 1986		LODGING by respondent of partial transcript not previously transcribed and before the lower court.
35	Feb 11 1986		Brief amicus curiae of AFL-CIO, et al. filed.
36	Feb 13 1986	D	Motion of Women's Legal Defense Fund, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
37	Feb 18 1986		CIRCULATED.
38	Feb 11 1986		Brief amicus curiae of Working Women's Institute, et al. filed.
39	Mar 3 1986		Motion of Women's Legal Defense Fund, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
40	Mar 14 1986	X	Reply brief of petitioner PSFS Savings Bank filed.
41	Mar 25 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
JUN 21 1985
ALEXANDER L. STEVAS
CLERK

84-1979

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PSFS SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Do allegations that a supervisory male employee made sexual advances toward a subordinate female employee, without any loss or threatened loss of tangible job benefits, state a claim of employment discrimination because of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*?

II. Is an employer absolutely liable under Title VII for a supervisor's sexual advances where the employer neither knew nor reasonably could have known of, had no opportunity to stop, and did not intend to permit, the sexual advances?

III. Is evidence that the complaining employee invited and welcomed her supervisor's sexual advances and voluntarily engaged in workplace sexual conduct admissible in defense of her Title VII claim?

LIST OF PARTIES

Capital City Federal Savings and Loan Association, petitioner, defendant-appellee below.*

Mechelle Vinson, respondent, plaintiff-appellant below.

Sidney L. Taylor, respondent, defendant-appellee below. Mr. Taylor is named as a respondent pursuant to Rule 19.6 because of his interest in the outcome of the petition.

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* Effective May 2, 1985, petitioner was merged into and is now known as PSFS Savings Bank, FSB. Petitioner's original name is used here for convenience.

Petitioner's parents, subsidiaries and affiliates (except wholly owned subsidiaries) are: The Philadelphia Saving Fund Society (owner of all voting stock of petitioner); Federal Savings and Loan Insurance Corporation (owner of income-producing certificates of petitioner); and PSFS Finance, Inc., and First National Real Estate Association Corporation (subsidiaries of The Philadelphia Saving Fund Society).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWING THE WRIT	6
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	2, 9
Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)	11
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)	5, 6
Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983)	8, 9
General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)	9
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)	6, 8, 11
Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985)	9
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)	10
Jeppsen v. Wunnicke, 37 Fair Empl. Prac. Cas. (BNA) 994 (D. Alaska Apr. 8, 1985)	9
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	8, 11
Tompkins v. Public Service Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977)	8
Constitution and Statutes:	
United States Constitution, amend. V	3, 5
Title 28, United States Code (1982)	
§ 1254	2
§ 1331	3
Title 42, United States Code (1982)	
§ 1985	3, 5
§§ 2000e, *et seq.* (Title VII, Civil Rights Act of 1964, as amended)	*passim*
Miscellaneous:	
110 Cong. Rec. 12723-24 (1964)	10
R. Conte and D. Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability*, 32 Drake L. Rev. 407 (1982-83)	7, 9
Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984)	2, 9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

CAPITAL CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

v.

MECHELLE VINSON, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Capital City Federal Savings and Loan Association ("Association"), petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the order filed January 25, 1985, in *Vinson v. Taylor, et al.*, D.C.Cir. No. 80-2369.

OPINIONS BELOW

The opinion and order of the District Court filed February 26, 1980, in No. CA 78-1793 (Penn, J.), awarding judgment for the Association and respondent Sidney L. Taylor, is reported at 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980) and is reproduced in the Appendix filed herewith ("App."), at 30a-46a.

The opinion and order of the Court of Appeals filed January 25, 1985, in No. 80-2369 (Robinson, C.J.,

Wright, J., and Northrop, J., of the United States District Court for the District of Maryland, sitting by designation), reversing the judgment of the District Court and remanding this case, is reported at 753 F.2d 141 (D.C.Cir. 1985) and is reproduced at App. 1a-21a.

On February 21, 1985, the Association timely filed a suggestion for rehearing en banc. The Court of Appeals' per curiam order, filed May 14, 1985, denying the suggestion, and the accompanying dissent by Bork, J., joined by Scalia and Starr, JJ., will be reported at 760 F.2d 1330 (D.C.Cir. 1985) and are reproduced at App. 22a-29a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The judgment sought to be reviewed was entered on January 25, 1985. By Order dated April 17, 1985, in No. A-782, this Court extended the time for filing a petition for a Writ of Certiorari to and including June 24, 1985.

STATUTES INVOLVED

Pertinent portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* (1982) ("Title VII"), are reproduced at App. 47a-52a.[1]

STATEMENT OF THE CASE

Respondent Mechelle Vinson ("Vinson"), a female, was hired by the Association in 1974 as a teller-trainee. Working under the supervision of Sidney L. Taylor ("Taylor"), a male Association branch manager and assistant vice president, she progressed to the positions

[1] Excerpts from Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984), are reproduced at App. 53a-55a. The Guidelines are not set out or cited pursuant to Rule 21.1(f) because they do not have the status of regulations. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-31 (1975).

of teller, head teller, and assistant branch manager. Her promotions were based solely on merit and were accompanied by every benefit normally attendant to such promotions. (App. at 31a, 42a.) In September 1978 Vinson took indefinite sick leave; she was eventually discharged for excessive use of that leave. (App. at 43a.)

While Vinson was still on sick leave and before she had been discharged, she brought this action against Taylor and the Association. Jurisdiction in the District Court was invoked generally under 28 U.S.C. § 1331, and specifically under 42 U.S.C. § 1985, Title VII, and the Fifth Amendment.

At the ensuing eleven-day bench trial, Vinson offered evidence that for several years during her employment Taylor made sexual advances which she reciprocated. The advances allegedly occurred both during and after business hours and on and off the branch premises. According to Vinson, Taylor also fondled her in front of other employees, followed her into the women's restroom, exposed himself to her, made lewd remarks, and even forcibly raped her on several occasions at the branch premises, causing injuries requiring medical attention. Vinson testified that these activities ceased in 1977 when she began seeing a steady boyfriend. Vinson admitted that she never filed a grievance with the Association, complained to any Association official, or reported the alleged rapes to the police. Vinson offered no competent medical evidence to corroborate any rape-related injuries.

Taylor denied that he had engaged in any of the alleged activity and testified that it was he who had rejected Vinson's advances. Taylor and the Association also presented evidence that Vinson frequently wore provocative clothing at work, suffered from bizarre sexual fantasies, and often volunteered many intimate details of her sex life to other employees at the branch. When

a co-worker specifically questioned her about Taylor, Vinson denied having had a sexual relationship with him. Additional evidence was presented that Vinson had been offered promotions by Taylor's superiors which would have involved transfers away from Taylor to other branches, but she turned them down.

After trial, the District Court ordered judgment for the defendants on all claims. (App. at 46a.) The District Court recognized that "sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions falls within protection of Title VII" (App. at 44a), but it found that Vinson had not been subjected to such treatment. (App. at 44a.) The District Court also ruled that because the Association was without notice of the alleged unlawful activity, it could not be held liable on Vinson's claim. (App. at 41a.)

In support of its judgment, the District Court rendered detailed findings, including the following: that Vinson received usual and customary salary increases and promotions based on merit alone and not as a result of rendering sexual favors; that Vinson was not required to grant sexual favors as a condition of employment; that if Vinson and Taylor did engage in a sexual relationship, the relationship was voluntary and had nothing to do with continued employment or promotions; that Vinson was not the victim of sexual harassment or discrimination; that the Association had an established policy against discrimination and a grievance procedure for reporting discrimination complaints; and that the Association had no notice of any sexual harassment or discrimination. (App. at 31a, 42a-44a.)

The Court of Appeals reversed the judgment below and ordered the case remanded. 753 F.2d at 152 (App.

at 21a).[2] According to the Court of Appeals, the District Court's conclusions were undermined because the District Court failed to recognize that Vinson had a Title VII claim "simply for pervasive on-the-job sexual harassment" that "illegally poisoned the 'psychological and emotional work environment' ", 753 F.2d at 144-45 (App. at 6a-8a) (quoting *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C.Cir. 1981)), aside from any threatened loss of tangible job benefits.

With respect to vicarious employer liability, the Court of Appeals announced an unqualified rule that "employers must answer for sexual harassment of any subordinate by any supervising superior" 753 F.2d at 150 (App. at 18a), even though the employer neither knew nor reasonably could have known about the harassment and had no opportunity to stop it.

The Court of Appeals did recognize the need in Title VII cases to "filter out personal relationships that are not products of employment-related intimidation . . . [since t]he touchstone . . . is that sexual advances must be unwelcome . . . ." 753 F.2d at 150 n.68 (App. at 17a n.68). Nonetheless, with respect to evidence offered in defense of Vinson's claim, the Court of Appeals held that the voluntariness of Vinson's participation in any relationship with Taylor "had no materiality whatsoever" and that evidence as to Vinson's dress while at work and her sexual fantasies and proclivities "had no place in this litigation." 753 F.2d at 146 and n.36 (App. at 9a and n.36).

The Association's subsequent suggestion for rehearing en banc was denied per curiam, Bork, J., joined by Scalia and Starr, JJ., dissenting. 760 F.2d at 1330 (App. at 22a).

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[2] Vinson's § 1985 and Fifth Amendment claims were abandoned on appeal. 753 F.2d at 143 n.12 (App. at 3a n.12). Thus, only the Title VII claim remains in the case.

REASONS FOR ALLOWING THE WRIT

The case involves important issues of federal employment discrimination law that should be settled by this Court. The Court of Appeals' resolution of the issues represents a far-reaching expansion of Title VII unsupported by the statute itself, the legislative history of the statute, or any decision of this Court. By its ruling on vicarious employer liability, the Court of Appeals placed the District of Columbia Circuit in conflict with three other Circuits. Finally, the Court of Appeals' evidentiary rulings departed from reason and from established Title VII principles.

The issues affect a large number of employers and their personnel. *See* 42 U.S.C. § 2000e(b) (App. at 47a), defining "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ." The issues can also be expected to arise frequently throughout the federal court system.

1. Expansion of Title VII.

The Court of Appeals' ruling in this case and in *Bundy v. Jackson*, 641 F.2d 934 (D.C.Cir 1981), that claims of sexual harassment and a sexually hostile environment are cognizable under Title VII, even though the employee was not required to grant sexual favors as a condition of employment and lost no tangible job benefits, significantly expands the scope of Title VII.[3] The *Bundy* court itself observed that its ruling was at that time novel and unprecedented. *Bundy v. Jackson*, *supra*,

[3] Cases in which demands for sexual favors are coupled with the granting or withholding of tangible job benefits are sometimes referred to as *"quid pro quo"* cases. Where, as here, tangible job benefits are not at stake, the cases are sometimes characterized as "harassment" or "hostile environment" cases. *See Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982).

641 F.2d at 943. Commentators have also recognized that *Bundy* significantly extended the law of sex discrimination. *See, e.g.*, R. Conte and D. Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability*, 32 Drake L. Rev. 407, 429 (1982-83).

As Judge Bork pointed out in his dissent from denial of rehearing en banc in this case:

> Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.' Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. . . . [The] bizarre result [produced by recognizing claims grounded on harassment by heterosexuals and homosexuals but not by bisexuals] suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.

760 F.2d at —— n.7 (App. at 28a-29a n.7) (Bork, J., dissenting).

The question whether Congress intended harassment to constitute discrimination because of sex needs to be settled by this Court.

2. Vicarious Employer Liability.

If sexual advances at the workplace can, without more, amount to sex discrimination under Title VII, the question arises whether and under what circumstances the employer may be vicariously liable for the violation. The Court of Appeals here adopted a rule of absolute employer liability in "hostile environment" cases regardless of notice or opportunity to stop the advances. Under that rule, the employer is a policeman of voluntary sexual activity and "an insurer that all relationships between

supervisors and employees are entirely asexual." 760 F.2d at —— (App. at 25a) (Bork, J., dissenting).

The Court of Appeals' rule of absolute employer liability conflicts with the notice requirement adopted by the Third Circuit, *Tompkins v. Public Service Elec. & Gas. Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977), and *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80 (3d Cir. 1983); the Fourth Circuit, *Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983); and the Eleventh Circuit, *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). *Henson v. City of Dundee* most clearly illustrates the conflict. That case involved both *quid pro quo* and hostile environment claims. The *Henson* court distinguished between the two and, as to the latter, said:

> Where, as here, the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker, she must show that *the employer knew or should have known* of the harassment in question and failed to take prompt remedial action.
>
> * * * *
>
> The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual. When a supervisor gratuitously insults an employee, he generally does so for his reasons and by his own means. He thus acts outside the actual or apparent scope of the authority he possesses as a supervisor. His conduct cannot automatically be imputed to the employer any more so than can the conduct of an ordinary employee.

Henson v. City of Dundee, *supra*, 682 F.2d at 905, 910 (emphasis added). *Accord*, *Katz v. Dole*, *supra*, 709 F.2d at 255 (in sexual harassment cases, plaintiff has additional responsibility of demonstrating that employer had actual or constructive knowledge of hostile work environment and took no prompt and adequate remedial action); *Craig v. Y & Y Snacks, Inc.*, *supra*, 721 F.2d at 80 (actual or constructive notice of harassment is necessary element of employer liability).[4]

The Court of Appeals based its rule of absolute employer liability in part on the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984) ("Guidelines"), stating that the Guidelines are "persuasive" and "'entitled to great deference,' especially when they are supported by the statute. . . ." 753 F.2d at 148-49 (App. at 14a-15a) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)). Such a holding invites widespread employer reliance on the Guidelines and invites other federal courts to accord similar deference. Insofar as the Guidelines adopt the strict liability standard, however, they are open to criticism. *See* R. Conte and D. Gregory, *supra*, 32 Drake L. Rev. at 410, where the authors comment:

> The courts have thus far wisely refrained from applying the Guidelines' strict liability standard in an unthinking fashion. Both Congress and the EEOC have thus been afforded valuable time to reconsider the internal inconsistency, the non-viability and the debilitating influence of the strict standard of employer liability for the actions of its supervisory agents in all cases.

(Footnote omitted.) This Court itself has previously cast substantial doubt on the authoritative status of the Guidelines. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976).

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[4] *Cf. Horn v. Duke Homes*, 755 F.2d 599, 604 (7th Cir. 1985), purporting to adopt a rule of absolute employer liability for harassment, although the case involved *quid pro quo* elements as well. *Cf. Jeppsen v. Wunnicke*, 37 Fair Empl. Prac. Cas. (BNA) 994 (D. Alaska Apr. 8, 1985), pointing out the conflict in circuits on the employer liability issue.

The Court of Appeals also based its rule of absolute employer liability on its reading of the legislative history of Title VII. *See* 753 F.2d at 148 and n.59 (App. at 14a and n.59), referring to an "unsuccessful attempt" to amend the Bill to add a "willfullness" requirement. But the court overlooked the subsequent, successful amendment to the Bill requiring that an unlawful employment practice be "intentionally" engaged in before relief may be awarded. 110 Cong. Rec. 12723-24 (1964). The intent requirement was eventually codified at 42 U.S.C. § 2000e-5(g) (App. at 52a). Although not referring specifically to § 2000e-5(g), this Court in *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977), said that "[p]roof of discriminatory motive is critical" in disparate treatment cases.

3. Admissibility of Complainant's Conduct as a Defense.

The need for review is heightened by the Court of Appeals' rulings that evidence may not be introduced showing the complainant's invitation of and voluntary participation in workplace sexual activity. Judge Bork called those rulings "astonishing" and "plainly wrong." He explained:

> By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it.

760 F.2d at —— (App. at 23a) (Bork, J., dissenting).

Sexual harassment differs from other types of employment discrimination. Circuit Judge MacKinnon earlier observed:

> Sexual advances may not be intrinsically offensive, and no policy can be derived from the equal employment opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorization cards, which serve no one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.

Barnes v. Costle, 561 F.2d 983, 1001 (D.C.Cir. 1977) (MacKinnon, J., concurring). Consistent with that observation, other circuits considering the question have stated that only unsolicited, unwelcomed, and offensive sexual advances can support a Title VII claim. *E.g.*, *Henson v. City of Dundee*, *supra*, 682 F.2d at 903; *Katz v. Dole*, *supra*, 709 F.2d at 254 n.3. Even the EEOC Guidelines, relied upon by the Court of Appeals as authoritative for other purposes, recognize that sexual advances must be "[u]nwelcome." Guidelines, § 1604.11(a) (App. at 53a).

Here the Court of Appeals held that evidence as to the voluntariness of Vinson's participation was immaterial, and it said that testimony as to Vinson's workplace dress and her sexual fantasies and proclivities had no place in the litigation. 753 F.2d at 146 and n.36 (App. at 9a and n.36). In practical effect, these holdings preclude any defense on critical elements of a Title VII claim. "The rules of evidence are [thus] rigged so that dalliance is automatically harassment because no one is allowed to deny it." 760 F.2d at —— (App. at 23a-24a) (Bork, J., dissenting).

CONCLUSION

The importance of the issues presented, the impact of those issues on employers and employment relations, the significance of employment discrimination claims to the business of the federal courts, and the unsettled state of the issues among the circuits, all warrant consideration of the case by this Court.

For the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari to the United

States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated at Washington, D.C.
this 21st day of June, 1985

APPENDIX

Office-Supreme Court, U.S.
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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58pp

TABLE OF CONTENTS

Page

1. Opinion and Order filed January 25, 1985, of the United States Court of Appeals for the District of Columbia Circuit, No. 80-2369 (Robinson, C.J., Wright, J., and Northrop, J., of the United States District Court for the District of Maryland, sitting by designation) 1a-21a

2. Order of the United States Court of Appeals, per curiam, and dissenting opinion of Bork, J., joined by Scalia and Starr, JJ., filed May 14, 1985, on suggestion for rehearing en banc 22a-29a

3. Opinion and Order filed February 26, 1980, of the United States District Court for the District of Columbia, No. CA 78-1793 (Penn, J.) 30a-46a

4. Excerpts, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* (1982) 47a-52a

5. Excerpts, Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984) 53a-55a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2369

MECHELE VINSON,
Appellant

v.

SIDNEY L. TAYLOR, *et al.*

Appeal from the United States District Court
for the District of Columbia

Argued February 16, 1982

Decided January 25, 1985

Patricia J. Barry for appellant.

Ronald A. Schechter for *amici curiae*, Equal Rights Advocates, Inc., *et al.*, urging reversal.

Fred Robert Troll, Jr., for appellee Capital City Federal Savings and Loan Association of Washington, D.C.

Before ROBINSON, *Chief Judge*, WRIGHT, *Circuit Judge*, and NORTHROP,* *Senior District Judge.*

Opinion for the Court filed by *Chief Judge* ROBINSON.

ROBINSON, *Chief Judge*: This appeal presents principally the question whether a corporate employer is ac-

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* Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

countable under Title VII of the Civil Rights Act of 1964,[1] as amended by the Equal Employment Opportunity Act of 1972,[2] for its supervisor's sexual harassment of a woman employee notwithstanding the employer's lack of actual knowledge thereof. The District Court answered in the negative.[3] We conclude that this holding is inconsistent with the intent of Title VII, and accordingly reverse.

I

We launch our review with a summary of the pertinent facts, as they were accepted by the District Court. In 1974, appellant Mechelle Vinson met appellee Sidney L. Taylor, who was a vice president of appellee Capital City Federal Savings and Loan Association and the manager of its Northeast Branch.[4] At Vinson's request, Taylor gave her an application for employment which she completed and returned, and promptly thereafter she was hired by Capital City.[5] With Taylor as her supervisor,[6] Vinson began her employment as a teller-trainee, and thereafter was promoted successively to teller, head teller, and finally to assistant branch manager.[7] It is undisputed, and the District Court expressly found, that Vin-

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[1] Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e *et seq.* (1982)) [hereinafter cited as codified].

[2] Pub. L. No. 92-261, 86 Stat. 103.

[3] *Vinson* v. *Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980).

[4] *Id.* at 38. This specific fact was not among the explicit findings of the District Court, but is undisputed. *Id.*

[5] *Id.*

[6] *Id.* at 42 (findings of fact ¶ 1).

[7] *Id.* (findings of fact ¶ 2). This finding states that Vinson became "administrative" branch manager. All other references to Vinson's ultimate position, in the record and in the court's opinion, speak of it as "assistant" branch manager. See *id.* at 38.

son's advancement was achieved on merit alone.[8] Vinson worked at the Northeast Branch for four years, when she took indefinite sick leave,[9] and was discharged two months later for excessive use of that leave.[10]

Vinson brought an action under Title VII against Taylor and Capital City,[11] alleging that she had been victimized by sex discrimination in the form of sexual harassment by Taylor.[12] At trial, the evidence bearing on

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[8] *Id.* at 42 (findings of fact ¶ 3).

[9] *Id.* at 43 (findings of fact ¶¶ 16, 17).

[10] *Id.* (findings of fact ¶ 18).

[11] *Vinson* v. *Taylor*, Civ. No. 78-1793 (D.D.C.).

[12] Complaint ¶¶ 2, 8, *Vinson* v. *Taylor*, Civ. No. 78-1793 (D.D.C.), Appendix for Appellant (A. App.) 10. Capital City moved to strike Vinson's appendix on the ground that it incorporates matter not admitted as substantive evidence at trial. Since we do not rely upon any of the offending material, we deny the motion as moot.

Vinson also invoked the Fifth Amendment and 42 U.S.C. § 1985(2) (1982) as bases for relief. Complaint, *supra*, ¶ 2, App. 10. At oral argument, Vinson's counsel conceded that there was no valid Fifth Amendment claim, and that the § 1985(2) claim cannot withstand *Great Am. Fed. Savs. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979).

Vinson moved unsuccessfully for leave to amend her complaint, which asserted only federal claims, to show supplementally her discharge by City, to request reinstatement and other relief, and to add two nonfederal causes of action. This effort came more than fourteen months after filing of the complaint and more than a year after the discharge, but less than two months before the trial date and shortly before the close of discovery; and the motion did not attempt to explain the long delay. See A. App. 32. The District Court denied the motion on the ground that it could have been made much earlier and thus could have avoided the need to reopen discovery and postpone the trial. *Vinson* v. *Taylor*, Civ. No. 78-1793 (D.D.C. Jan. 8, 1980) (memorandum) at 1-2, A. App. 54-55. Vinson's assignment of this ruling as error is not well taken. While leave to amend must "be freely given when justice so requires," Fed. R. Civ. P. 15(a), a grant of the motion here would have subjected the defendants to the burden of additional discovery,

Taylor's behavior during Vinson's employment was conflicting. Vinson testified that Taylor asked her to have sexual relations with him, claiming that she "owed him" because he had obtained the job for her; that after initially declining his invitation she ultimately yielded, but only because she was afraid that continued refusal would jeopardize her employment.[13] She further testified that thereafter she was forced to submit to sexual advances by Taylor at the Northeast Branch both during and after business hours, and that often Taylor assaulted or raped her.[14] In addition, she avowed, Taylor caressed her on the job, followed her into the ladies' room when she was there alone, and at times exposed himself to her.[15] Vinson added that Taylor also fondled other women employees,[16] and she attempted to call witnesses to support this charge, but the District Court would not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." [17]

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preparation and expense, thereby prejudicing their right to a prompt and inexpensive trial. In these circumstances, we cannot say that the court's action was an abuse of discretion. See *Serrano Medina* v. *United States*, 709 F.2d 104, 106 (1st Cir. 1983); *PSG Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659, 664 (9th Cir. 1969), *cert. denied*, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970); *DeBry* v. *Transamerica Corp.*, 601 F.2d 480, 492 (10th Cir. 1979). We intimate no view on the disposition to be made should Vinson renew the motion on remand of this case.

[13] *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 38. This court was not furnished a complete transcript of the proceedings at trial. Citations, therefore, are to the District Court's opinion rather than to the trial record.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 38-39 n.1. Appellant challenges this ruling on appeal, Brief for Appellant at 37, and later we address it. See text *infra* at notes 39-41.

Taylor denied Vinson's accusations of sexual activity and contended that Vinson aired them in retaliation for a business-related dispute.[18] Capital City also controverted Vinson's story, and asserted that any sexual harassment by Taylor was unknown to and unauthorized by it.[19] The District Court rendered judgment for Taylor and Capital City [20] on the grounds that Vinson had not been subjected to sexual harassment or discrimination,[21] and that in any event Capital City would not be accountable.[22] Our interpretation of Title VII leads us to disagree.

II

We first address the District Court's holding that Vinson did not make out a case of sex discrimination, even

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[18] *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 39.

[19] *Id.*

[20] *Vinson* v. *Taylor*, Civ. No. 78-1793 (D.D.C. Feb. 26, 1980). The District Court rejected a challenge to its jurisdiction, advanced on the ground that Vinson had not filed a complaint with the Equal Employment Opportunity Commission (EEOC) before coming into court. See 42 U.S.C. § 2000e-5 (1982). Because Vinson received a right-to-sue notice from EEOC after institution of her suit, the court sustained its jurisdiction. *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 40. While this holding has not been attacked on appeal, we note that it is now firmly established that a timely filing with EEOC is not a jurisdictional prerequisite to suit in a district court. *Zipes* v. *Trans World Airlines*, 455 U.S. 385, 392-398, 102 S.Ct. 1127, 1132-1135, 71 L.Ed.2d 234, 243-247 (1982); *De Medina* v. *Reinhardt*, 222 U.S.App.D.C. 371, 386, 686 F.2d 997, 1012 (1982); *Thompson* v. *Sawyer*, 229 U.S. App.D.C. 393, 425 n.36, 678 F.2d 257, 289 n.36 (1982); *Gordon* v. *National Youth Work Alliance*, 218 U.S.App.D.C. 337, 340-341, 675 F.2d 356, 359-360 (1982); *Saltz* v. *Lehman*, 217 U.S.App.D.C. 354, 355, 672 F.2d 207, 208 (1982).

[21] *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 43.

[22] *Id.* at 42.

against Taylor. Given due deference to the court's findings of fact,[23] we believe that in critical respects they fatally undermine the legal conclusion that Vinson did not suffer a violation of Title II.

The District Court found that Vinson "was not required to grant Taylor or any other member of Capital sexual favors as a condition of either her employment or in order to obtain promotion." [24] That finding would have significance had Vinson been confined to a theory of discrimination based upon an imposition of sex-oriented conditions to her employment status. An infringement of Title VII is not, however, necessarily dependent upon the victim's loss of employment or promotion.[25]

Depending upon the particular facts, at least two separate avenues may be open to a Title VII plaintiff for a demonstration of unlawful sex discrimination. The first was recognized in *Barnes* v. *Costle*,[26] where we held that abolition of the job of a female employee because she spurned her male superior's sexual advances was an infringement of Title VII.[27] The second approach is illustrated by *Bundy* v. *Jackson*,[28] decided after the District Court's judgment herein, where we sustained a Title VII cause of action in favor of a woman employee seeking relief simply for pervasive on-the-job sexual harassment by her superiors.[29]

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[23] See Fed. R. Civ. P. 52(a).

[24] *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 42 (findings of fact ¶ 4).

[25] *Bundy* v. *Jackson*, 205 U.S.App.D.C. 444, 456, 641 F.2d 934, 946 (1981).

[26] 183 U.S.App.D.C. 90, 561 F.2d 983 (1977).

[27] *Id.* at 99, 561 F.2d at 992.

[28] *Supra* note 25.

[29] 205 U.S.App.D.C. at 453-454, 641 F.2d at 943-944.

Vinson's grievance was clearly of the latter type [30] and, accordingly, her cause counseled an inquiry as to whether Taylor "created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." [31] The District Court did not undertake a determination on whether a Title VII violation of this nature had occurred.[32] It follows that

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[30] Although both *Barnes* and *Bundy* involved Title VII claims of sexual harassment, the situations they respectively addressed and the resulting holdings are sharply distinct. The differences are well summarized in EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1984) [hereinafter cited as *Guidelines*]. In EEOC's words,

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. . . .

Id. § 1604.11(a). That is *Barnes*-type harassment, and a transgression of Title VII. See *Barnes* v. *Costle*, *supra* note 26, 183 U.S.App.D.C. at 97, 561 F.2d at 900. A violation also occurs when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," 29 C.F.R. § 1604.11(a) (1984)—*Bundy*-type harassment. See *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 453-454, 641 F.2d at 943-944.

[31] *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 453-454, 641 F.2d at 943-944 (emphasis in original).

[32] The District Court stated that Vinson "was not the victim of sexual harassment and was not the victim of sexual discrimination while employed at Capital. . . ." *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 43 (findings of fact ¶ 21). Though included among the court's findings of fact, that label is not controlling, e.g., *Smith* v. *Fletcher*, 80 U.S.App.D.C. 263, 152 F.2d 20 (1945), and we cannot tell whether the court meant that in the legal sense Vinson was not victimized—because her situation did not qualify under *Barnes*, see *id.* pt. V and text *supra* at note 30, or

we must remand in order that the court may ascertain whether, as in *Bundy*, Vinson was subjected to "sexually stereotyped insults" or "demeaning propositions" that illegally poisoned the "psychological and emotional work environment." [32]

The District Court further found that

> [i]f [Vinson] and Taylor did engage in an intimate or sexual relationship during the time of [Vinson's] employment with Capital, that relationship was a voluntary one by [Vinson] having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.[34]

This finding leaves us uncertain as to precisely what the court meant. It could reflect the view that there was no Title VII violation because Vinson's employment status was not affected, an error to which we already have spoken. Alternatively, the finding could indicate that be-

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because her relationship with Taylor was thought to have been voluntary, see text *infra* at note 34—or whether the statement was intended as the ultimate resolution of the conflicting evidence on Taylor's behavior toward Vinson. If the latter, it is not acceptable as such. A finding of fact must, at minimum, furnish enough detail to disclose the steps by which the court arrived at its conclusion on the factual issue, see *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415, 422, 63 S.Ct. 1141, 1145, 87 L.Ed. 1485, 1489 (1943); *Fehringer* v. *Bluebeard's Castle, Inc.*, 395 F.2d 851 (3d Cir. 1968); *Denofre* v. *Transportation Ins. Rating Bureau*, 532 F.2d 43, 45 (7th Cir. 1976); *Anderson* v. *City of Albuquerque*, 690 F.2d 796, 803 (10th Cir. 1982), otherwise "[i]t is impossible to tell from [it] upon what underlying facts the court relied, and whether proper statutory standards were observed." *Schneiderman* v. *United States*, 320 U.S. 118, 130, 63 S.Ct. 1333, 1339, 87 L.Ed. 1796, 1804-1805 (1943). The finding of non-harassment and non-discrimination is fatally 'acking when measured by that standard.

[33] *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 454, 641 F.2d at 944.

[34] *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 42 (findings of fact ¶ 5).

cause the relationship was voluntary there was no sexual harassment—no "[u]nwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature . . . ha[ving] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." [35] If, however, the evidence warranted a finding of sexual harassment by that standard, Vinson's "voluntari[ness]" had no materiality whatsoever.[36]

Bundy held that a woman employee need not prove resistance to sexual overtures in order to establish a Title VII claim of sexual harassment.[37] From that point we take what is hardly a major step by recognizing that a victim's capitulation to on-the-job sexual advances cannot work a forfeiture of her opportunity for redress. If capitulation were dispositive, the "cruel trilemma" identified in *Bundy*—in which a victim must choose among acquiescence in the harassment, opposition to it, or regulation from her job [38]—would be an even more hideous quadrilemma featuring a fourth option—to yield and thereby lose all hope of legal redress for being put in this intolerable position in the first place. We cannot ascribe

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[35] *Guidelines*, *supra* note 30, 29 C.F.R. § 1604.11(a) (1984).

[36] The District Court did not elaborate on its basis for the finding of voluntariness, but it may have considered the voluminous testimony regarding Vinson's dress and personal fantasies. See Appendix for Appellee 42-50. Since, under *Bundy*, a woman does not waive her Title VII rights by her sartorial or whimsical proclivities, *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 454, 455-456, 641 F.2d at 944, 945-946, that testimony had no place in this litigation.

[37] *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 456, 641 F.2d at 946. See also C. MacKinnon, Sexual Harassment of Working Women 46-47 (1979) (discussing futility of resistance requirement for sexual harassment claim).

[38] *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 456, 641 F.2d at 946.

to Congress a willingness to visit such an unenviable quandary upon an employee. A victim's "voluntary" submission to unlawful discrimination of this sort can have no bearing on the pertinent inquiry: whether Taylor made Vinson's toleration of sexual harassment a condition of her employment.

Another matter, an evidentiary ruling, prompts brief discussion. The District Court refused to allow Vinson to elicit, from other women under Taylor's supervision during her tenure, testimony that assertedly would have established that Taylor sexually harassed them also. Some testimony of this kind was admitted on the issue of notice to Capital City of Taylor's behavior, but Vinson was not permitted to use it in her case-in-chief for other purposes.[39] *Bundy* makes clear that evidence tending to show Taylor's harassment of other women working alongside Vinson is directly relevant to the question whether he created an environment violative of Title VII.[40] Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.[41] The District Court erred when it denied Vinson the opportunity to demonstrate that Taylor had directed his advances toward other women also.

III

The District Court also ruled that Vinson's employer, Capital City, could not be held responsible for any in-

[39] See text *supra* at note 17.

[40] Such evidence could be critical to a plaintiff's case, for a claim of harassment cannot be established without a showing of more than isolated indicia of a discriminatory environment. *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 453 n.9, 641 F.2d at 943 n.9.

[41] Cf. *EEOC Decision No. 71-909*, Fair Empl. Prac. Cas. (BNA) at 269-270 (maintenance of working environment in which racial insults against blacks are habitual also violation of white employees' statutory rights).

fringements of Title VII by Taylor because it had no notice of the offensive conduct charged to him.[42] To the court, "it seem[ed] reasonable that an employer should not be liable in these unusual cases of sexual harassment where notice to the employer must depend upon the actual perpetrator and when there is nothing else to place the employer on notice." [43] We cannot accept this conclusion or its rationale.

So much as this court has heretofore decided runs counter to the District Court's holding. Nothing before us in *Barnes* suggested that the employer, a federal agency, was aware of the activity of the superior involved, yet we adverted to the general rule that "an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel," [44] and rejected the notion that the superior's conduct insulated the employer merely "because it was a personal escapade rather than an agency project." [45] And in

[42] *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 42.

[43] *Id.* Capital City had a grievance procedure whereby a complaint was first to be made to the aggrieved employee's supervisor, and thereafter the grievance was to be resolved by the division head or the president. *Id.* at 43 (findings of fact ¶ 13). Vinson contended that management had been notified of Taylor's alleged harassing conduct by various means, but the District Court found that the employer had no knowledge of it. *Id.* at 41. The court held that notice to Taylor would not constitute notice to Capital City. *Id.* at 42.

[44] *Barnes* v. *Costle*, *supra* note 26, 183 U.S.App.D.C. at 100, 561 F.2d at 993.

[45] *Id.* at 99, 561 F.2d at 992. The District Court placed reliance on our observation in *Barnes* that "should a supervisor contravene employer policy without the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved from responsibility under Title VII." *Id.* at 100, 561 F.2d at 993. That statement should not be laden with a significance beyond its function merely as an acknowledgement of holdings in the two cases

Bundy, we reaffirmed our continuing allegiance to the proposition that an employer is answerable for discriminatory acts committed by supervisory personnel,[46] though we were not required there to apply that principle to employers without notice, since those having control over personnel practices had full knowledge of the harassment and did virtually nothing to stop it.[47]

Today, however, we are confronted by the question that was not directly and actively litigated in *Barnes* or *Bundy*: Whether Title VII imposes upon an employer without specific notice of sexual harassment by supervisory personnel responsibility for that species of discrimination.[48] We hold that it does.

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we there cited. One of those cases, *Miller* v. *Bank of Am.*, 418 F.Supp. 233 (N.D. Cal. 1976), was subsequently reversed on appeal, 600 F.2d 211 (9th Cir. 1979); the other, *Howard* v. *National Cash Register Co.*, 388 F.Supp. 603 (S.D. Ohio 1975), concerned racial slurs, not by supervisory personnel, but co-workers, who differ radically from supervisors in the scheme of vicarious liability. See *Guidelines*, *supra* note 30, 29 C.F.R. §§ 1604.11(c), (d) (employer vicariously responsible for sexual harassment by supervisory personnel irrespective of employer's knowledge, but for harassment committed by co-workers only if employer knows or should have known of it). See also *Silver* v. *KCA, Inc.*, 586 F.2d 138, 142 (9th Cir. 1978) (continuing course of racial harassment by co-workers cannot be charged to employer unless employer knows of it and fails to take remedial action). See generally Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1460-1463 (1984) (discussing employer liability).

[46] *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 453, 641 F.2d at 943.

[47] See *id.*

[48] As framed by the District Court, the issue was "whether Capital received notice of the alleged sexual harassment directed against [Vinson] and allegedly against other female employees of the bank." *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 40-41. We think the question properly was whether, irrespective of notice, Capital City would be vicariously responsible under Title VII for that kind of sex discrimination by Taylor.

With exceptions not relevant here,[49] Title VII provides in pertinent part that

> [i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .[50]

"Employer" is defined as "a person engaged in an industry affecting commerce" with a workforce of specified size, "and any agent of such a person. . .;"[51] and "person" includes "associations."[52] Taken literally, then, Title VII as much outlaws sex discrimination by an "agent" of an association as by the association itself;[53] put another way, such discrimination by an "agent" of Capital City is as much an affront to Title VII as it would be if engaged in by Capital City as an entity. It is clear that Taylor, as manager of Capital City's Northeast Branch, was Capital City's "agent" with respect to other employees of that branch,[54] and equally clear that the sexual harassment charged to Taylor was forbidden sex discrimination.[55]

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[49] See 42 U.S.C. §§ 2000e-2(e), (h) (1982).

[50] *Id.* § 2000e-2(a)(1).

[51] *Id.* § 2000e(b).

[52] *Id.* § 2000e(a).

[53] It appears that Capital City is an unincorporated association, but whatever its organizational form, the definition of "person," see *id.* § 2000e(a), is broad enough to cover it.

[54] As the *Guidelines*, *supra* note 30, prescribe, "[t]he Commission will examine the circumstances of the particular employment relationship and the job junctions [*sic*] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." 29 C.F.R. § 1604.11(c) (1984).

[55] *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 456, 614 F.2d at 946.

We have encountered nothing impuning our reading of the statutory text as meaning that infractions of Title VII by agents are unlawful employment practices attributable to their employers. The legislative history of Title VII is virtually barren of indications, one way or the other, of a vicarious responsibility for employers.[56] The Senate debates did, however, evoke a few expressions of concern over analogous matters, and these, such as they were, assumed that such a responsibility would exist. Senator Stennis, in opposition to the bill that became Title VII,[57] felt that an employer might be held answerable for discrimination practiced by a labor union from which the employer secured its employees; "[u]nder this title," he stated, "it is altogether possible that individuals would be held responsible for violations over which they have no control."[58] Senator Tower, also a protestant, noted that a specific discriminatory intent was unnecessary, so that "[i]t would appear to be sufficient to show that discrimination does in fact exist."[59] While we are wary of interpretations of a statute voiced by opponents during heated debate, we know that at least the prospect of vicarious employer accountability was raised before Congress.

What the legislative history does not provide can be gleaned, however, from other persuasive indicators of

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[56] *See Barnes* v. *Costle*, *supra* note 26, 183 U.S.App.D.C. at 105, 561 F.2d at 998 (MacKinnon, J., concurring) ("[c]ombining the legislative history of the Civil Rights Act turns up no direct statement that employers are to be vicariously liable").

[57] H.R. 7152, 88th Cong., 2d Sess. (1963).

[58] 110 Cong. Rec. 5820 (1964) (remarks of Senator Stennis).

[59] 110 Cong. Rec. 8177 (1964) (remarks of Senator Tower, reading a summary analysis of the bill prepared by the National Association of Manufacturers). There was in fact an unsuccessful attempt to amend the bill to incorporate a "willfullness" requirement. See *id.* at 8194 (amendment 507) (presentation of Senator Dirksen).

congressional intent. To begin with, the Equal Employment Opportunity Commission (EEOC), has promulgated guidelines which, as "administrative interpretation[s] of the Act by the enforcing agency," are "entitled to great deference,"[60] especially when they are supported by the statute and not inconsistent with its legislative history;[61] and EEOC's *Guidelines on Discrimination Because of Sex*[62] are unambiguous on the subject:

> Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.[63]

We attach considerable weight to this interpretation, and we agree that treatment of supervisory personnel as "agents" is in conformity with "general Title VII prin-

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[60] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280, 304 (1975), quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165-166 (1971). In each case, the Court was speaking of EEOC's Guidelines on Employment Testing Procedures, 29 C.F.R. §§ 1607 *et seq.* (1984). We think EEOC's *Guidelines*, *supra* note 30, are equally "administration interpretation[s] of the Act by the enforcing agency," and as such, "entitled to great deference." See *Gray* v. *Greyhound Lines, East*, 178 U.S.App.D.C. 91, 98, 545 F.2d 169, 176 (1976) (EEOC interpretation of Title VII entitled to great weight).

[61] Cf. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-146, 97 S.Ct. 401, 410-412, 50 L.Ed.2d 343, 357-359 (1976) (EEOC guidelines not entitled to deference when they conflict with earlier EEOC position, other administrative interpretations, and legislative history).

[62] 29 C.F.R. §§ 1604.1-1604.11 (1984).

[63] *Id.* § 1604.11(c).

ciples".[64] Our cases have established, as the cornerstone of present analysis, that sexual harassment is a violation of Title VII.[65] Neither the statutory language nor its legislative history suggests that, as a trespass on Title VII, it should be treated any differently from transgressions arising out of racial or religious discrimination.[66] And the caselaw in these latter areas establishes beyond cavil that "an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel." [67]

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[64] See *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 457, 641 F.2d at 947 (endorsing EEOC guidelines).

[65] *Id.* at 456, 641 F.2d at 946; *Barnes* v. *Costle*, *supra* note 26, 183 U.S.App.D.C. at 102, 561 F.2d at 995. Accord *Guidelines*, *supra* note 30, 29 C.F.R. § 1604.11(a) (1984).

[66] The only significant legislative history regarding sex discrimination was generated in conjunction with the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. §§ 2000e *et seq.* (1982). As we pointed out in *Barnes* v. *Costle*, *supra* note 26, 183 U.S.App.D.C. at 94, 561 F.2d at 987, the House Committee on Education and Labor, speaking to that legislation, declared that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 5 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137, 2141. Once we accept the proposition that sexual harassment is illegal discrimination—as, after *Barnes* and *Bundy*, we must—efforts to eradicate it should proceed with as much fervor as has been directed toward other violations of Title VII.

[67] *Barnes* v. *Costle*, *supra* note 26, 183 U.S.App.D.C. at 100 & n.71, 561 F.2d at 993 & n.71 (citing numerous cases); accord *Bundy* v. *Jackson*, *supra* note 25, 205 U.S.App.D.C. at 453, 641 F.2d at 943. See also *Calcote* v. *Texas Educ. Found., Inc.*, 578 F.2d 95, 98 (5th Cir. 1978) (racial harassment by supervisor in course of duties is enough to support finding that supervisor's acts are "deliberate" acts of employer); *Young* v. *Southwestern Savs. & Loan Ass'n*, 509 F.2d 140, 144 n.7 (5th Cir. 1975) (employer responsible under Title VII for supervisor's religious discrimination although supervisor had no authority to fire and employer had no opportunity to correct problem); *Anderson* v. *Methodist*

We have no difficulty in concluding that an employer may be held accountable for discrimination accomplished through sexual harassment [68] by any supervisory employee with authority to hire, to promote or to fire. An employer's delegation of this much authority vests in the supervisor such extreme power over the victimized employee that the supervisor's stature as an "agent" of the employer cannot be doubted. We do not believe, however, that vicarious responsibility is limited to discrimination by supervisors so richly endowed. The mere existence—or even the appearance [69]—of a significant degree of influence in vital job decisions gives any supervisor the

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Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972) (employer answerable under Title VII for supervisor's racially discriminatory discharge of employee despite employer's "outstanding record in regard to fair and impartial treatment of the races"); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) (employer liable under Title VII for any race-based violation occasioned by any person in authorized capacity as supervisor).

EEOC, too, has found employers in violation of Title VII where a supervisor imposed or maintained a discriminatory work environment. See, e.g., *EEOC Decision No. 71-909*, *supra* note 41, 3 Fair Empl. Prac. Cas. (BNA) at 269 (employer responsible for racial intimidation caused by supervisor's habitual use of demeaning racial epithet); *EEOC Decision No. 71-2042*, 3 Fair Empl. Prac. Cas. (BNA) 1102, 1103 (1971) (employer responsible for supervisor's insistence that black employees address her as "maam").

[68] In determining the appropriateness of attribution, enough specificity must be imparted to "harassment" to filter out personal relationships that are not products of employment-related intimidation. For purposes of this case, we are well served by the criteria reflected in the EEOC *Guidelines*. See 29 C.F.R. § 1604.11(a) (1984), quoted in relevant part *supra* note 30. The touchstone of these criteria is that sexual advances must be unwelcome, and must in some way amount to an explicit or implicit term or condition of employment in the sense either of job status or work environment.

[69] See *Young v. Southwestern Savs. & Loan Ass'n*, *supra* note 67, 509 F.2d at 144 n.7 (despite supervisor's lack of actual authority to fire, employer cannot disclaim responsibility for religious discrimination by supervisor whose actions appeared to be authorized).

opportunity to impose upon employees. That opportunity is not dependent solely upon the supervisor's authority to make personnel decisions; the ability to direct employees in their work, to evaluate their performances and to recommend personnel actions carries attendant power to coerce, intimidate and harass.[70] For this reason, we think employers must answer for sexual harassment of any subordinate by any supervising superior.[71]

In so holding, we consider only the statutory language and interpretations authoritatively placed upon it. We do not resort to the common-law doctrine of respondeat superior.[72] Echoing the words of the Supreme Court in an analogous context, "[i]t will not do, for deciding the question as one of uniform national application, to import wholesale the traditional common-law conceptions. . . .

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[70] The District Court found that all salary increases, bonuses and promotions were determined by officials other than Taylor, but that Taylor made written recommendations respecting employees in his branch under consideration therefor. *Vinson* v. *Taylor*, supra note 3, 23 Fair Empl. Prac. Cas. (BNA) at 43 (findings of fact ¶ 9). Notwithstanding this finding, the court indicated some concern because "there was no evidence as to Taylor's status in the bank, that is, whether the title Assistant Vice President is honorary or whether that title confers upon Taylor some greater responsibility and relationship to the management of the bank." *Id.* at 42. In light of the finding that Taylor submitted recommendations on compensation and promotion, no further involvement in the decisional process was needed.

[71] The bare existence of a company policy of nondiscrimination does not affect the employer's chargeability. E.g., *Guidelines*, *supra* note 30, 29 C.F.R. § 1604.11(c) (1984), quoted in text *supra* at note 63; *Weins* v. *Boorstin*, 19 Fair Empl. Prac. Cas. (BNA) 186, 187-188 (D.D.C. 1979) (employer responsible for recruitment officer's discrimination despite dissemination of equal-opportunity guidelines). Capital City had such a policy, *Vinson* v. *Taylor*, *supra* note 3, 23 Fair Empl. Prac. Cas. (BNA) at 43 (findings of fact ¶ 15), but it affords small comfort when violations go unrectified.

[72] But see *Miller* v. *Bank of Am.*, *supra* note 45, 600 F.2d at 213, though we embrace the court's result.

That result hardly would be consistent with the statute's broad terms and purposes." [73]

Traditional principles of respondeat superior, as they obtain in the field of torts, are not altogether suitable for resolution of questions of Title VII law.[74] The explanation is manifest: Title VII is a mandate from Congress to cure a perceived evil—certain types of discrimination in employment—in a prescribed fashion.[75] Rules of tort law, on the other hand, have evolved over centuries to meet diverse societal demands by allocating risks of harm and duties of care. Without clear congressional instruction, we think it unsafe in developing Title VII jurisprudence to rely uncritically on dogma thus begotten.

More particularly, limitations imposed by the doctrine of respondeat superior have no place in enforcement of the congressional will underlying Title VII. Confining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest

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[73] *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124-125, 64 S.Ct. 851, 857-858, 88 L.Ed. 1170, 1181 (1944) (declining to incorporate common-law definition of "employee" into National Labor Relations Act without specific congressional authorization). See also *Tidwell* v. *American Oil Co.*, 332 F.Supp. 424, 436 (D. Utah 1971) (attributing supervisor's acts to employer and distinguishing contrary decision on ground that it dealt with agency rules for common-law tort).

[74] *Barnes* v. *Costle*, *supra* note 26, 183 U.S.App.D.C. at 107, 561 F.2d at 1000 (concurring opinion) (noting instances when common-law rule should be ousted).

[75] See *Griggs* v. *Duke Power Co.*, *supra* note 60, 401 U.S. 424, 429, 91 S.Ct. 849, 853, 28 L.Ed.2d 158, 163 (1971) ("[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute").

women employees.[76] While modern courts seem more inclined to treat intentional misconduct on the job as arising out of and in the course of the employment,[77] and thus as providing a basis for liability under a somewhat expanded theory of respondeat superior, there simply is no need to so confine either the analysis or the solution where Title VII applies.[78]

To hold that an employer cannot be reached for Title VII violations unknown to him is, too, to open the door to circumvention of Title VII by the simple expedient of looking the other way, even as signs of discriminatory practice begin to gather on the horizon. As the Ninth Circuit has said, "[s]uch a rule would create an enormous loophole in the statutes," [79] one we think the courts should strive to seal. Instead of providing a reason for employers to remain oblivious to conditions in the workplace, we think the enlightened purpose of Title VII calls for an interpretation cultivating an incentive for employers to take a more active role in warranting to each employee that he or she will enjoy a working environment free from illegal sex discrimination.[80] A higher level of

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[76] See Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. Rev. 535, 539 (1981) (under strict common-law test vicarious Title VII responsibility would be rare).

[77] See W. Prosser & W. Keeton, Law of Torts 505-507 (5th ed. 1984).

[78] Indeed, notwithstanding the modern trend in the tort field, courts could find intentional acts outside the scope of employment when committed for purely personal reasons. See *Corne* v. *Bausch & Lomb, Inc.*, 390 F.Supp. 161, 163 (D. Ariz. 1975) (no Title VII claim against employer because supervisor's harassing conduct was nothing more than personal proclivity), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977).

[79] *Miller* v. *Bank of Am.*, *supra* note 45, 600 F.2d at 213.

[80] "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to

imputed responsibility than respondeat superior imposes is one way to guard against the danger that disobedience of Title VII will escape scrutiny and go unremedied.

Employer responsiveness to on-the-job discrimination at the supervisory level is an essential aspect of the remedial scheme embodied in Title VII. It is the employer alone who is able promptly and effectively to halt discriminatory practices by supervisory personnel, and only the employer can provide reinstatement, backpay or other remedial relief contemplated by the Act.[81] Much of the promise of Title VII will become empty if victims of unlawful discrimination cannot secure redress from the only source capable of providing it.

A requirement of knowledge by the employer of Title VII transgressions by supervisory personnel would effectively eliminate vicarious Title VII responsibility altogether. It would reserve Title VII liability for only those employers who fail to redress known violations—a direct, not a substitutional, theory of attribution. This would be a retreat from the level of protection Title VII has consistently and designedly afforded,[82] and take a backward step we refuse to endorse.

In sum, we hold that Vinson alleged facts sufficient to state a claim of sex discrimination cognizable under Title VII, and that any discriminatory activity by Taylor is attributable to Capital City. Vinson is entitled to an adjudication of that claim on the evidence, considered in light of the legal principles applicable. To that end, we reverse the judgment appealed from and remand the case to the District Court for proceedings consistent with this opinion.

So ordered.

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raise the issue of harassment under Title VII, and developing methods to sensitize all concerned." *Guidelines*, *supra* note 30, 29 C.F.R. § 1604.11(f) (1984).

[81] See 42 U.S.C. § 2000-5(g) (1982) (remedies available under Title VII).

[82] See note 67 *supra*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2369

MECHELE VINSON,
Appellant

v.

SIDNEY L. TAYLOR, et al.

On Appellees' Suggestion For Rehearing En Banc

Filed May 14, 1985

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

Appellees' suggestion for rehearing *en banc* has been transmitted to the full Court. A majority of the judges of the Court in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

A dissenting opinion filed by Circuit Judge Bork is attached and is joined by Circuit Judges Scalia and Starr.

BORK, *Circuit Judge*, with whom *Circuit Judges* Scalia and Starr join, *dissenting from the denial of rehearing en banc*: This case should be reheard en banc. It involves important issues of antidiscrimination law, at least two of which are wrongly decided. The panel's resolutions of the various issues before it, taken in combination, produce an unacceptable result. According to the panel opinion, when an employee charges sexual harassment in the workplace, the supervisor charged may not prove that the sexual behavior, far from constituting harassment, was voluntarily engaged in by the other person, nor may the supervisor show that the charging person's conduct was in fact a solicitation of sexual advances. These rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it.

The panel opinion explicitly states that a plaintiff's voluntariness in participating in a sexual relationship with her supervisor "can have no bearing on the pertinent inquiry" in a sexual harassment suit brought under Title VII. *Vinson* v. *Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985). The panel finds legally insignificant the following factual finding by the district court:

> if [Vinson] and Taylor did engage in an intimate or sexual relationship during the time of [Vinson's] employment with Capital, that relationship was a voluntary one by [Vinson] having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.

Id. at 145 (footnote omitted). This finding may have been irrelevant to environmental, as opposed to quid pro quo, harassment because it speaks of continued employment and advancement. But the panel did not rest on that distinction and rejected voluntariness as a defense in any kind of case. The panel's reasoning on this point

is entirely circular. The opinion states that to allow proof of voluntariness on the part of a woman employee would expose her to what the panel sees fit to characterize as a "hideous quadrilemma"—the victim must acquiesce in the harassment, oppose it, resign, or yield and lose all hope of legal redress. *Id.* at 146. Passing the point that yielding and acquiescing would seem to be the same thing, the argument succeeds only because the defendant is denied the right to prove that the "victim" is not that but a willing participant. The rules of evidence are rigged so that dalliance is automatically harassment because no one is allowed to deny it.

The harmfulness of the panel decision is augmented by additional rulings on what evidence is to be admissible in Title VII sexual harassment cases. On the one hand, the panel holds that plaintiffs must be allowed to introduce evidence of their supervisor's behavior toward other employees in an effort to establish a pattern or practice of sexual harassment. 753 F.2d at 146. On the other hand, the panel also holds that a supervisor must not be allowed to introduce similar evidence of an employee's dress or behavior in an effort to prove that any sexual advances were solicited or welcomed. *Id.* at 146 n.36. In this case, evidence was introduced suggesting that the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to other employees at the bank. While hardly determinative, this evidence is relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in. Obviously, such evidence must be evaluated critically and in the light of all the other evidence in the case, but it is astonishing that it should be held inadmissible.[1] Added

[1] The panel cited no evidentiary rules or authorities in defense of its statement that this evidence should be suppressed. The sole reason given for excluding the evidence was that "under *Bundy* [v. *Jackson*, 641 F.2d 934 (D.C. Cir. 1981)], a woman does not waive her Title VII rights by her sartorial or whimsical proclivities." 753 F.2d at 146 n.36. I am not aware of anything in Title VII or the Federal Rules of Evidence that authorizes a court to suppress evidence that may be relevant to the presence of discriminatory intent. The panel has thus failed to perform the analysis required before relevant evidence may be excluded.

to the elimination of any voluntariness defense, these rulings make certain that to be charged is to be guilty.

But it is not the supervisor alone who is deprived of essential defenses. The panel decision makes the employer vicariously liable for the acts of the supervisor even though those acts were wholly unknown to the employer and were directly contrary to his instructions.[2] Of course, the employer is also prohibited from demonstrating that the alleged harassment was instead voluntary participation or that advances made were solicited. The result is that the employer is virtually converted into an insurer that all relationships between supervisors and employees are entirely asexual. Though the employer has no way of preventing sexual relationships, he is defenseless and must pay if they occur and are then claimed to be harassment.[3]

The Supreme Court has never addressed the question of an employer's vicarious liability under Title VII. I

[2] In this case, employer Capital City had an official policy of nondiscrimination. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (findings of fact ¶ 15) (D.D.C. 1980). Accordingly, any acts of harassment by supervisor Taylor were unauthorized and against company policy.

[3] In this case, the employer could not have done more to avoid liability without actually monitoring or policing his employees' voluntary sexual relationships. Aside from the very outrageousness of such policing, it would be a very high cost way, undoubtedly the highest cost way, of solving the problem. *But cf.* Horn v. Duke Homes, No. 82-1944, mem. op. (7th Cir. Feb. 26, 1985) (Swygert, J.) (holding employer strictly liable in Title VII sexual harassment case in part because "the employer is a more efficient cost avoider than is the injured employee"), *reprinted in part in* 52 U.S.L.W. 2446.

would, however, not suggest that we sit en banc to decide that issue were it not clear that the evidentiary rulings already discussed should be reconsidered en banc. That being so, we ought to take up the difficult and important question of an employer's vicarious liability under Title VII for conduct he knows nothing of and has done all he reasonably can to prevent. In doing this, we cannot necessarily import wholesale notions of vicarious liability which are evolving in lower court Title VII cases involving racial discrimination. We have previously recognized that various Title VII doctrines may require some modification before they can be applied in sexual harassment cases.[4] *Bundy* v. *Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981). The doctrine of vicarious liability may be one such doctrine since it is extremely unlikely that a supervisor would harass an employee for the purpose of furthering his employer's business. Indeed, supervisors engaging in such harassment (whether or not in violation of an explicit company policy) would ordinarily be aware that their employer disapproved of their actions.

Therefore, whatever the proper rule in cases involving racial discrimination, it would be appropriate for the en

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[4] We recognized in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), for example, that the "literal" *McDonnell-Douglas* test, *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 805 (1973), which normally governs Title VII actions does not apply "precisely" to Title VII sexual harassment claims. As we explained in *Bundy*, this is because

> the *McDonnell* formula presumes the standard situation where the alleged discrimination is due to the bare fact of the claimant's membership in a disadvantaged group. It therefore . . . fails to fit with precision the very unusual, perhaps unique, situation of sexual harassment, where the alleged basis of discrimination is not the employee's gender *per se*, but her refusal to submit to sexual advances which she suffered in large part because of her gender.

641 F.2d at 951 (emphasis in original). Accordingly, it was necessary to modify the *McDonnell* test in *Bundy* so that it would fit the unique situation of the sexual harassment claim.

banc court to re-examine the vicarious liability issue in the unique context presented by sexual harassment claims.[5] The panel's rule is at odds with traditional practice which was not to hold employers liable at all for their employee's intentional torts involving sexual escapades.[6] In addition, the panel's rule is at odds with,

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[5] The panel opinion relies on several decisions in other circuits which, of course, are not binding on this court. Most of those decisions discuss vicarious liability under Title VII in the somewhat different situation where racial discrimination is at issue. 753 F.2d at 149; *see also* Barnes v. Costle, 561 F.2d 983, 993 n.71 (D.C. Cir. 1977) (collecting cases). I have examined those cases and have concluded that they do not provide us with much guidance. None of the cases cited analyze in detail the precise nature of Title VII vicarious liability and most of them devote only a single conclusory sentence of analysis to the complicated issue. Therefore, it would be appropriate for the en banc court to re-examine carefully the vicarious liability doctrine at least insofar as it applies in sexual harassment cases.

[6] The panel concedes that its decision could not stand under "[t]raditional principles of respondent superior as they obtain in the field of torts." 753 F.2d at 150. Under those principles an employer is only liable for his employee's intentional torts when their "purpose . . . is wholly or in part to further the master's business." W. Prosser, *Law of Torts* 464 (4th ed. 1971). Intentional torts involving sexual escapades almost never result in employer liability because they are personally motivated. It is perhaps conceivable but certainly highly unlikely that a supervisor would engage in sexual harassment for the purpose of furthering his employer's business. *See* Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. Rev. 535, 539 (1981) (under common law test vicarious Title VII responsibility would be rare).

Notwithstanding the traditional rule, the panel claims that strict vicarious liability is mandated here because that is the position taken by the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex. The panel asserts that these guidelines are "entitled to great deference" since they are "administrative interpretation[s] of the Act by the enforcing agency." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975), *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). Nonetheless, the Supreme Court has recently cautioned us not to

or is at least a substantial extension of, the prior case law in this circuit. The two prior decisions of this court upon which the panel relied were both cases where the employer was fully aware of the acts of sexual harassment perpetrated by its supervisory employees. *Bundy* v. *Jackson*, 641 F.2d at 943; *Barnes* v. *Costle*, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring). Indeed, we qualified our holdings in both cases by indicating that if "a supervisor contravene[s] employer policy without the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved from responsibility under Title VII." *Barnes*, 561 F.2d at 993; *Bundy*, 641 F.2d at 943. Accordingly, the panel in the present case has apparently gone well beyond *Barnes* and *Bundy* in holding this employer vicariously liable for its supervisor's alleged sexual harassment when the employer was not even made aware of and given the chance to rectify the consequences of the harassment alleged.[7]

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defer too enthusiastically to guidelines published by the EEOC. General Electric Co. v. Gilbert, 429 U.S. 125, 140-45 (1976). Such guidelines are entitled to deference only when the underlying reasoning is persuasive. *Id.* at 142, *quoting* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (rejecting EEOC guidelines on employment selection procedures).

[7] Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as "discrimination." Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. The artificiality of the approach we have taken appears from the decisions in this circuit. It is "discrimination" if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does *not* prohibit sexual harassment by a "bisexual superior [because] the insistence upon sexual favors would . . . apply to male and female employees alike." *Barnes* v. *Costle*, 561 F.2d at 990 n.55; *Bundy* v. *Jackson*, 641 F.2d at 942 n.7. Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible. Had Congress been aiming at sexual harassment, it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks. That bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender. If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines. *See, e.g., Bundy* v. *Jackson*, 641 F.2d at 951.

For all the foregoing reasons, I would rehear this case en banc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 78-1793

MECHELLE VINSON,
Plaintiff

v.

SIDNEY L. TAYLOR and
CAPITAL CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendants

[Filed Feb. 26, 1980]

OPINION

The plaintiff brought this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Fifth Amendment to the Constitution, based on her allegation that she was the victim of sex discrimination in the form of sexual harassment. Specifically, she contends that she was sexually harassed by her immediate supervisor, Sidney Taylor, who was the Branch Manager of the Northeast Branch of the Capital City Federal Savings and Loan Association (Capital), during the period in question. She alleges that she was required to perform sexual favors, including sexual intercourse, in order to maintain her employment at Capital.

I

The following facts are undisputed. The plaintiff, who is a female, met Taylor, who she then knew was the

Branch Manager of the Northeast Branch of Capital, in a parking lot in September 1974 and inquired whether she might obtain employment at Capital. Taylor gave her an application which she completed and returned the next day. That same afternoon she was called by Taylor and advised that she had been employed. Plaintiff began her employment on or about September 9, 1974. She started as a teller-trainee, was promoted to teller in 90 days after successfully completing her probationary period, and thereafter was promoted to head teller and then assistant branch manager. She achieved her promotions based solely on her merits as an employee of the bank. Plaintiff does not contend that she was required or asked to give sexual favors in order to obtain promotions. She worked at the Northeast Branch of Capital from September 1974 until September 1978 when she took indefinite sick leave. She was finally discharged from the bank on or about November 1978.

The above facts are not disputed but the following facts are disputed by the parties.

The plaintiff contends that Taylor was like a fatherly figure during her probationary period and shortly thereafter, that on at least one occasion he gave her money so that she could obtain her own apartment, that he was helpful in other ways, and that he never demanded sexual favors throughout this period. She testified that in May 1975 he took her to dinner at a local Chinese restaurant, the name of which she cannot now remember, and that during dinner he suggested that after dinner they go to a motel for the purpose of having sexual relations. She contends that she owed him since he obtained the job for her. She allegedly continued to resist but he insisted and after dinner they drove to a motel where she waited outside in his automobile while he registered. She was unable to remember the name of the motel. He then took her to a room, asked her to wait while he showered, which she did, and then they engaged in sexual relations. She

testified that she did so only because she was afraid that her failure to grant him a sexual factor would result in her dismissal from the job. Thereafter, according to her testimony, he made repeated demands upon her for sexual favors, usually at the Northeast Branch of Capital. She testified that she was forced to engage in sexual relations with him at the bank during and after banking hours, that they engaged in intercourse in the bank vault, in other rooms at the bank, and in a storage area in the bank basement, that all of these activities were against her will, and that he often actually assaulted or raped her. She states that on one occasion in May 1967 he so brutally raped her that it led to serious vaginal bleeding for which she was required to seek a doctor's care. Taylor allegedly had intercourse with the plaintiff some 40 or 50 times between May 1975 and 1977. She contends that he stopped making sexual demands upon her only when she started going with a steady boyfriend and that he made no further sexual demands upon her after 1977. Plaintiff also testified that Taylor sexually harassed her in other ways including fondling her breasts and buttocks on the job, sometimes in the presence of co-workers, and in entering the ladies restroom when she was there alone, and by sometimes exposing himself to her. She also testified that Taylor touched and fondled other women employees of the bank or made suggestive remarks in their presence.[1] Plaintiff also testified that Taylor advised her in 1977 that she would be given her own Branch Man-

[1] Plaintiff sought to call witnesses to support her claim that Taylor made similar advances to other female employees at Capital. Although some testimony of that nature was permitted without objection, the Court did not allow plaintiff to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases. Defendants denied the allegations of the plaintiff and also denied the allegations relating to other employees of the bank. Plaintiff, in her rebuttal, did not seek to offer evidence to establish any pattern or practice by the defendant Taylor.

agership and that he advised her in June 1978 that she would be promoted to Branch Manager in December 1978 and assigned to the Tacoma Park Branch. Plaintiff testified further that she never reported Taylor's demands, harassment or activities to any of his supervisors and never attempted to utilize Capital's complaint procedure because she was afraid of Taylor and because he had threatened to have her raped like Christine Malone, another employee of the bank.[2], and had threatened her life.

Taylor denies the plaintiff's allegations. He testified that he never fondled her, never made suggestive remarks to her and never engaged in a sexual relationship with her and never asked her to do so. He states that he did take plaintiff and Christine Malone to lunch on one or more occasions but that he never took plaintiff alone. He also testified that plaintiff made advances to him which he declined. He contends that he had a problem when plaintiff took too much sick leave and that in June of 1978, when plaintiff was the assistant branch manager of the Northeast Branch of Capital, and he was the Manager, that he had instructed her to train a Dorothy McCallam to be a head teller. Plaintiff resisted that instruction and attempted to train a Karen Kirkland instead. Plaintiff was to train Ms. McCallam while Taylor was on vaction but when Taylor returned from his vacation he contends that he found that plaintiff had attempted to train Ms. Kirkland and not Ms. McCallam. He argued with plaintiff over her refusal to train Ms. McCallam and he surmises that plaintiff has brought these charges against him because she was seeking to get even with him because of his instruction that she train McCallam.

[2] Christine Malone was allegedly raped by an unknown assailant sometime in 1974. She had allegedly reported the incident to plaintiff and plaintiff testified that Ms. Malone was extremely upset over the incident and that she really has not been the same since that incident. There was no evidence introduced or proffered that Taylor or anyone else connected with Capital had anything to do with the alleged assault on Ms. Malone.

Capital denies the allegations made by plaintiff and argues that in the event sexual advances were made by Taylor, they were not with the consent or approval of the bank, and such activities were unknown to the bank. Capital offered evidence to show that no complaint had been made to the bank either by plaintiff or any other female employee of the bank.[3]

II

Defendants challenge the jurisdiction of this Court to entertain plaintiff's Title VII claim because the plaintiff filed this action on September 22, 1978, prior to filing a complaint with the Equal Employment Opportunity Commission (EEOC). Thus they contend that under the authority of 42 U.S.C. § 2000e(5) and the decisions in *Stebbins* v. *Continental Insurance Companies*, 143 U.S. App. D.C. 121, 442 F.2d 843 (1972), and *Macklin* v. *Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979 (1973), the plaintiff's Title VII claim must be dismissed.

The court in *Macklin* quite clearly stated that "[u]nder the terms of Title VII of the 1964 Civil Rights Act . . ., a plaintiff may not bring suit in District Court until he has first filed a complaint with the Equal Employment Opportunity Commission". 156 U.S. App. D.C. at 75, 578 F.2d at 988. In this case it is uncontroverted that this action was instituted before the plaintiff had filed her complaint with EEOC; the complaint with EEOC was filed on or about November 22, 1978, some two months after the complaint in this action. Plaintiff has demonstrated no unusual circumstances for not filing a timely complaint with the EEOC and accordingly, up to this point, under the decisions in *Stebbins* and *Macklin* this court lacks jurisdiction.

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[3] Capital raised this argument in a motion for summary judgment prior to the trial however, that motion was denied because the Court concluded that there were genuine issues of material facts. *See* Fed. R. Civ. P. 56.

Consideration of the issue cannot stop at that point, however, because the plaintiff did file a complaint with EEOC in November 1978. Her former attorney thereafter wrote to EEOC on March 21, 1979, and requested a right to sue letter. That letter was written in such a way as to suggest that while plaintiff had filed a court action, that the action was filed pursuant to 42 U.S.C. § 1985(3) and not under Title VII. In fact, plaintiff's counsel noted that he wished "to amend the Complaint to include Title VII". A review of the complaint reveals that Title VII was included when the complaint was filed on September 22, 1978, a fact obviously within the knowledge of plaintiff's counsel.[4] The right to sue letter issued on March 28, 1979.

Defendants nevertheless argue that since the right to sue letter was received after this action had been filed, the court lacks jurisdiction over plaintiff's Title VII claim. In view of the ultimate disposition of this case, the jurisdictional issue is not as important as it might have been, but the issue warrants a brief comment by the Court.

The precise issue presented here was not involved in either *Stebbins* or *Macklin*. In both cases the plaintiffs had filed complaints with EEOC before filing their cases in the District Court. Both plaintiffs had waited a reasonable time before filing their court actions and thereafter filed their actions without awaiting the right to sue letter. The issue in those cases then was not whether the plaintiffs had filed claims with EEOC before instituting their court action but rather whether they were required to receive their right to sue letters before instituting court action. The problem in those cases came about

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[4] The letter of March 21, 1979 was written by former counsel for the plaintiff and not by her precent counsel, Ms. Patricia Berry, the attorney who represented plaintiff at the trial. There is absolutely nothing in the record to suggest that Ms. Berry knew anything about the letter of March 21, 1979, prior to her entering her appearance in this case in July 1979.

because EEOC did not give plaintiffs notice of their inability to obtain voluntary compliance. The facts here are less favorable to the plaintiff since the plaintiff here merely bypassed the EEOC procedure altogether and filed this action in this court. Nothing offered by plaintiff during the course of the trial in this case supports any contention that there were unusual circumstances which prevented her from filing her complaint with EEOC.

Second, the plaintiff's complaint cited, in addition to Title VII, 42 U.S.C. § 1985(2), and the Fifth Amendment. Since a right to sue letter is not a jurisdictional prerequisite for prosecuting those latter claims, the plaintiff was properly in court on September 22, 1978, and the court accordingly had jurisdiction over those claims.

Third, if Title VII had not been included in the complaint originally filed in this case, could plaintiff have thereafter amended her complaint to make that allegation once she received the right to sue letter? A liberal construction of the rules would suggest that that question be answered in the affirmative. Thus plaintiff can argue here that if she could have amended the complaint under those circumstances to assert a Title VII once the right to sue letter had issued, the Court should now have jurisdiction over her Title VII claim since the right to sue letter was thereafter issued.

The Court has found no cases on this issue but has not exhaustively researched the issue in view of the ultimate disposition in this case. It is noted however, that the statute itself is not clear as to the jurisdictional necessity for a right to sue letter and in that sense differs from the Age Discrimination in Employment Act, 29 U.S.C. § 626d, and as the Court of Appeals for this circuit has noted, the legislative history "has aptly been labeled 'chaotic'". (Footnotes omitted) 143 U.S. App. D.C. at 123, 442 F.2d at 845.[5]

[5] The decisions in *Stebbins* and *Macklin* are controlling as to the jurisdictional requirement that a complaint be filed with EEOC prior to the institution of legal action in the courts. *See also Great American Federal Savings and Loan Association* v. *Novotny*, 99 S. Ct. 2345, 2349-50, n.14, (1979).

While the Court will assume that it now has jurisdiction over the plaintiff's Title VII action since she has now received her right to sue letter, it notes that that issue has not been clearly resolved by case law. The rights of litigants would be better protected if the statute was clarified either by amendment or by case law. Here the court need not reach that issue in view of the disposition of this case. In any event, the Court notes that the purpose of the complaint to EEOC is so that that agency may seek conciliation and, in the proper case, voluntary compliance where warranted. Notwithstanding the fact that claims other than those made under Title VII are involved, those other claims are based on the same factual predicates and involve the same general issue raised under Title VII, and once those issues are before the Court the likelihood of conciliation no doubt lessens. It seems unlikely that Congress intended that a plaintiff be allowed to bypass EEOC based upon her allegation that her claim can be grounded on some other statute and that she thereafter be permitted to amend her claim to assert one under Title VII. It would appear that any plaintiff could do so. The practical effect is that the plaintiffs would be allowed to bypass EEOC.

III

A second issue raised in this case is whether Capital received notice of the alleged sexual harassment directed against plaintiff and allegedly against other female employees of the bank.

Plaintiff contends that Capital received notice in one of three ways. First she contends that Christine Malone advised Mr. Burton, the Vice President of Capital, in 1974 when she left the Bank, and that she further advised the bank through her attorney, Mr. John Verchot,

when Verchot wrote Capital on behalf of Ms. Malone and complained of sexual harassment. Second, plaintiff contends that Mary Levarity complained about sexual harassment to Mr. Burton. Third, the plaintiff contends that the primary actor in this case, Sidney Taylor, a named defendant, was her supervisor and a Branch Manager of the bank and an Assistant Vice President, that alone is sufficient notice to the bank.

It is important to note before discussing the above contentions that plaintiff concedes that she did not give or attempt to give notice to or file a complaint with any officer or representative of Capital.

The claim that notice was given by Christine Malone must be rejected. Ms. Malone testified that when she left Capital she told Mr. Burton about "strange things" going on at the Northeast Branch. She also allegedly made a similar statement to a police officer at the time he was investigating a robbery at the bank. Although Ms. Malone first testified that she specifically referred to "sexual harassment" in her conversation with Mr. Burton, she later admitted that she had not used that term. Defendants introduced portions of an affidavit which Ms. Malone had signed in opposition to Capital's motion for summary judgment and portions of her deposition. The affidavit and the deposition testimony was introduced for the purpose of impeachment and the Court concludes that the testimony of Ms. Malone regarding the issue of notice was impeached and that such testimony is entitled to little or no weight. Moreover, the Court accepts the testimony of Mr. Burton who testified that Ms. Malone never made any complaint concerning sexual harassment or harassment and that he never had any conversation with her regarding "strange things" going on at the bank.

Plaintiff also attempted to introduce by way of oral testimony the contents of a letter purportedly written by Attorney John Verchot who had been retained by Ms.

Malone when she left the employ of the bank. Plaintiff contends that that letter was set to Capital and complained of "sexual harassment". The defendants denied ever receiving such a letter. Ms. Malone did not have a copy of that letter and plaintiff did not call Mr. Verchot to testify that he ever sent such a letter. The only letter written by Mr. Verchot which was introduced into evidence was one addressed to Capital dated May 5, 1975, which merely states: "This office represents Ms. Christine Malone in connection with her dismissal by your association." (See Deft. Ex. 3A.) The Court concluded that the missing letter was not admissible and would not accept oral testimony as to its contents. Mr. Burton testified that Capital did not receive any such letter. The Court finds that there is no evidence that such a letter was every written or even sent to Capital.

The Court also finds that Capital was not given notice of "sexual harassment" or discrimination by Ms. Mary Levarity.

The last issue on notice to the bank is whether notice to Taylor, the alleged perpetrator of the sexual harassment on plaintiff, is notice to the bank.

Plaintiff argues that since Taylor was her supervisor and the Branch Manager and in addition, an Assistant Vice President, that notice to him was notice to the bank. She cites *Barnes* v. *Costle*, 183 U.S. App. D.C. 90, 561 F.2d 983 (1977), and *Miller* v. *Bank of America*, 600 F.2d 211 (9th Cir. 1979) in support of this argument.

Both *Barnes* and *Miller* must be read within the context of the issues presented on appeal. In *Barnes*, the District Court had granted defendant's motion for summary judgment apparently based on its conclusion that the alleged discriminatory practice was not encompassed by the Civil Rights Act. 183 U.S. App. D.C. at 93, 561 F.2d at 986. The Court of Appeals rejected the argument that the alleged sexual harassment fell outside of the

Civil Rights Act on the theory that "it was a personal escapade rather than an agency project". 183 U.S. App. D.C. at 99, 561 F.2d at 991. The decision notes that an employer may be held liable and also recognizes "that should a supervisor contravene employer policy *without* the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved from responsibility under Title VII". (Footnotes omitted.) 183 U.S. App. D.C. at 100, 561 F.2d at 992. A reading of *Barnes* thus indicates that the employer was not absolved from liability merely because of its policy against discrimination and further that the trial court is required to consider the facts in determining whether the employer may be liable. The issue was not properly disposed of on defendant's motion for summary judgment.

In *Miller*, the Court came to the same conclusion as in *Barnes*. There the trial court had granted summary judgment, *see Miller* v. *Bank of American*, 418 F. Supp. 233 (ND Cal. 1976), and suggested that the plaintiff had not made out a cause of action absent "specific factual allegations" that the employer's policy permits a consistent, as opposed to isolated, sex based discrimination. The appellate court reversed.

The instant case is in a much different posture than *Barnes* or *Miller* since here the plaintiff has had a full opportunity to present evidence as to the knowledge of Taylor and his authority within the bank. Capital had issued an equal employment opportunity policy statement (Deft Ex. 5) and designated Mr. Burton as the EEOC advisor. Taylor did not have the authority to hire or fire or promote, but he did have the authority to make recommendations. Notwithstanding the language in *Miller*, *see* 600 F.2d at 213, that such actions by plaintiff's supervisor may be sufficient to invoke the doctrine of respondeat superior, it seems reasonable that an employer should not be liable in these unusual cases of sexual harassment where notice to the employer must depend upon the actual perpetrator and when there is nothing else to place the employer on notice. These facts are different from those cited in *Miller* v. *Bank of America*, *supra*, 600 F.2d at 213, where a taxi company is liable for injuries to a pedestrian caused by the negligent operation by one of its drivers notwithstanding the fact that the company has a safety training program, since in that example, the injury to the pedestrian is not caused because of an attempt by the driver to gratify his own desires. In *Barnes* the court noted that there may have been a conspiracy of more than one of the supervisors. Here Taylor was supervisor at a branch of Capital, the plaintiff did not complain to anyone, no other tellers complained, and that there was no evidence that Taylor solicited the assistance of other supervisors or officers of the bank to help him promote the harassment of plaintiff, and the bank had a policy asserting its dedication to equal treatment and employee rights. Furthermore there was no evidence as to Taylor's status in the bank, that is, whether the title Assistant Vice President is honorary or whether that title confers upon Taylor some greater responsibility and relationship to the management of the bank.

This Court concludes that the evidence presented by plaintiff does not establish that notice to Taylor should amount to notice to the bank. Since plaintiff has conceded that she did not give notice to the bank and since the Court has concluded that not such notice was given by either Christine Malone or Mary Levarity, the Court concludes that the bank was without notice and cannot be held liable for the alleged actions of Taylor.

IV

The Court makes the following additional findings of fact: [6]

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[6] These are in addition to those facts which are uncontroverted and those findings made with respect to jurisdiction, notice to Capital and the authority of Sidney Taylor, set forth in Parts I II, and III, *supra*.

1. The plaintiff began her employment with Capital as a teller trainee at the Northeast Branch. Her supervisor was Sidney Taylor, the Branch Manager.

2. The plaintiff rapidly advanced from teller trainee to teller to head teller and then to administrative branch manager.

3. Plaintiff's promotions were based on merit alone; her promotions and advancements with Capital did not result from her rendering sexual favors to Taylor or any other member of Capital.

4. Plaintiff was not required to grant Taylor or any other member of Capital sexual favors as a condition of either her employment or in order to obtain promotion.

5. If the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with Capital, that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.[7]

6. At the inception of this litigation, Mechelle Vinson had not filed a written complaint with the Equal Employment Opportunity Commission, nor had she received a notice of right to sue letter.

7. No efforts were made by EEOC to investigate the merits of Mechelle Vinson's charges, or to conciliate the alleged discriminatory practices.

8. Throughout her employment with the Association, Mechelle Vinson received usual and customary increases in salary, Christmas bonuses, and promotions, on the basis of merit.

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[7] Mary Levarity testified that she thought there was a relationship between plaintiff and Taylor but she also testified that plaintiff did not appear to be afraid of Taylor.

9. All raises, bonuses and promotions were determined by officials at the Association, not Mr. Taylor, who only made written recommendations.

10. Mechelle Vinson turned down a transfer as head of the "unchecking account" department of the Association as well as the opportunity of heading the annuities office of the Takoma Park Branch.

11. Mechelle Vinson was never present at any meeting with any officials of the Association at which Mr. Taylor's alleged sexual harassment was discussed.

12. The alleged sexual harassment involving Mechelle Vinson was not reported by her or by anyone on her behalf to the police or to any officials at the Association.

13. The Association's Employee Manual provides a grievance procedure whereby any employee may state a grievance and have it resolved, if not by a supervisor, then by the division head or the president.

14. Mechelle Vinson never filed an informal or formal grievance against defendant, Sidney L. Taylor, pursuant to the Association's Employee Manual.

15. The express policy of the defendant Association is one of nondiscrimination in employment practices.

16. Beginning September 21, 1978, plaintiff failed to report to work.

17. When contacted about the absence from her employment, Mechelle Vinson told Mr. Taylor that she wouldn't be in, it would be indefinite, and that she was ill.

18. On November 1, 1978, the Association informed plaintiff that she was terminated due to excessive use of sick leave.

19. No female employee of defendant Association filed an EEOC complaint or formal grievance procedure charg-

ing defendant Taylor with sexual harassment during the period in question.

20. In late summer or early September, 1978, Mr. Taylor and Mechelle Vinson clashed with each other as a result of Mr. Taylor's attempts to train Dorethea McCallum as head teller.

21. Plaintiff was not the victim of sexual harassment and was not the victim of sexual discrimination while employed at Capital during the period September 9, 1974 through November 1978.

V.

It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions falls within protection of Title VII. *See Barnes* v. *Costle, supra, Miller* v. *Bank of America, supra, Tompkins* v. *Public Service Electric & Gas,* 568 F.2d 1044 (3d Cir. 1977), *Healan* v. *Johns-Manville Corp.,* 451 F. Supp. 1382 (D. Colo. 1978), *Williams* v. *Saxby,* 413 F. Supp. 654 (D DC 1976) reversed and remanded 190 U.S. App. D.C. 343, 587 F.2d 1240 (1978).

This Court after carefully considering the evidence offered by the parties has concluded that the plaintiff was not the victim of sexual harassment or sexual discrimination. This being the case, plaintiff is not entitled to recover under Title VII and those charges related to both defendants shall be dismissed with prejudice.

Much the same can be said with respect to plaintiff's claim made under the Fifth Amendment. Plaintiff does not stand to recover in view of the Court's findings of facts. Additionally, while moot in view of the ultimate disposition in this case, the Court notes that plaintiff has not made out a valid Fifth Amendment claim. *Cf. Moose Lodge* v. *Irvis,* 407 U.S. 163 (1972).

In view of the above, this Court shall enter an order granting judgment to the defendants and dismissing this case with prejudice, each party to bear his own costs.

Dated: February 26, 1980

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 78-1793

MECHELLE VINSON,
Plaintiff

v.

SIDNEY L. TAYLOR and
CAPITAL CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendants

[Filed Feb. 26, 1980]

ORDER

Pursuant to the Opinion filed in this case on February 26, 1980, it is hereby

ORDERED that judgment is entered for the defendants and it is further

ORDERED that this case is dismissed with prejudice and it is further

ORDERED that each party shall bear their own costs.

February 26, 1980

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

EXCERPTS, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§ 2000e, et seq.

SUBCHAPTER VI—EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public

office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

• • • •

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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§ 2000e-5. Enforcement provisions

• • • •

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing expedition of case; appointment of master

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political

subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * * *

EXCERPTS, GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. Part 1604 (1984)

* * * *

§ 1604.1 General principles.

(a) References to "employer" or "employers" in this Part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to sex discrimination on a case-by-case basis.

* * * *

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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[1] The principles involved here continue to apply to race, color, religion or national origin.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

* * * *

OPPOSITION

BRIEF

COPY

Supreme Court, U.S.
FILED
AUG 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1979 (3)

In The

Supreme Court of the United States

October Term, 1984

PSFS SAVINGS BANK, FSB,

Petitioner,

vs.

MECHELLE VINSON, et al.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do allegations of a complaining female employee that a supervisory male employee conditioned her continued employment on her engaging in sexual intercourse with him, and that he created a hostile, sexually-demeaning work environment state a claim of sex discrimination in violation of **Title VII** of the **Civil Rights Act of 1964**, as amended, **42 U.S.C. §§2000e, et seq.?**

2. Is an employer liable under **Title VII** for a supervisor's sexual misconduct on the job regardless of whether the employer knew or should have known that the supervisor required the complaining employee to have sexual intercourse with him in order to continue her employment and repeatedly raped her at the workplace and that he created a pervasive sexually-demeaning work environment?

3. Is an employer permitted to present evidence that the complaining employee invited and/or welcomed the supervisor's sexual advances?

4. Is the employer permitted to introduce evidence of the complaining employee's manner of dress at the work place, or of her discussions with co-workers of sexual matters?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
RESTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	9
I. EVERY CIRCUIT WHICH HAS CONSIDERED THE ISSUE HAS RULED SEXUAL HARASSMENT, WHETHER OF THE "HOSTILE ENVIRONMENT" OR "QUID PRO QUO" TYPE, IS SEX DISCRIMINATION PROHIBITED UNDER TITLE VII.	9
II. TO HOLD THE EMPLOYER STRICTLY LIABLE UNDER TITLE VII FOR ACTS OF SEXUAL HARASSMENT COMMITTED BY ITS SUPERVISORY PERSONNEL IS IN ACCORDANCE WITH TITLE VII LAW.	16
III. THE COURT OF APPEALS DID NOT RULE THAT EVIDENCE OF COMPLAINANT'S CONDUCT WAS INADMISSIBLE.	26
IV. EVIDENCE OF VINSON'S DRESS AT WORK OR DISCUSSIONS OF SEXUAL MATTERS OUGHT TO BE INAD-	

TABLE OF CONTENTS CONT'D

	Page
MISSIBLE IN TITLE VII SEXUAL HARASSMENT CASES.	28
V. CONCLUSION	31

TABLE OF AUTHORITIES

Cases:	Page:
Barnes v. Costle, 561 F.2d 983 (1977)	12
Bundy v. Jackson, 641 F.2d 934 (1981)	12,13,15
Craig v. Y.& Y. Snacks, Inc., 721 F.2d 77 (1983)	11,18,19, 23
Flowers v. Krouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977)	22
Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (1977)	11
General Electric Co. v. Gilbert, 429 U.S. 125, 141-42, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976)	14,15
Henson v. City of Dundee, 682 F.2d 897 (1982)	11,12,13,15, 19,21,27
Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (1985)	11,15,18, 19,25,26
Katz v. Pole, 709 F.2d 251, (1983)	11,19,21
McDonnell Douglas Corp. v. Greene, 411 U.S. 792 (1973)	24

TABLE OF AUTHORITIES CONT'D

Cases:	Page:
Miller v. Bank of America, 600 F.2d 211 (1979)	11,22,24
Rogers v. EEOC, 454 F.2d at 238	13
Tomkins v. Public Service Electric and Gas Company, 568 F.2d 1044 (1977)	11,19,21, 23
Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985)	13,18,25, 26,27
Young v. Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1977)	22
Statutes, Rules, and Regulations:	
Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.	passim
Rule 412, Federal Rules of Evidence	29
Guidelines on Discrimination Because of Sex, Sexual Harassment	14,15
29 C.F.R. §1604.11(a)	26
29 C.F.R. §1604.11(a-f)	14
29 C.F.R. §1604.11(d)	23

TABLE OF AUTHORITIES CONT'D

Miscellaneous:	Page:
MacKinnon, Sexual Harassment of Working Women (Yale University 1979)	28
124 Cong. Record at P.H. (1944)	30

No. 84-1979

In The

Supreme Court of the United States

October Term, 1984

PSFS SAVINGS BANK, FSB,

Petitioner,

vs.

MECHELLE VINSON, et al.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Patricia J. Barry, on behalf of Respondent Mechelle Vinson, respectfully opposes the Petition for Writ of Certiorari filed by F. Robert Troll, Jr., attorney with the law firm of Ross, Marsh and

Foster on behalf of Petitioner PSFS Savings Bank, FSB, to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

The Questions Presented for review is at page (i) of the bank's petition and restated at page (i) of this Opposition. The Statement of Jurisdiction, Statutory Provisions Involved, and Statement of the Case are found at pages 1-5 of the bank's petition, and a restatement of the case is found at pages 2-9 of this opposition. The opinicns below are found at pages 1a-46a of Petitioner's Appendix.

RESTATEMENT OF THE CASE

The plaintiff below, Michelle Vinson ("Vinson") met Sidney Taylor ("Taylor") who she then knew was the Branch Manager of the Northeast Branch of the bank,

in a parking lot in September 1974 and inquired whether she might obtain employment at the bank. Taylor gave her an application which she completed and returned the next day. That same afternoon she was called by Taylor and advised she had been employed. Vinson began her employment on or about September 9, 1974. She started as a teller-trainee, was promoted to teller in 90 days after successfully completing her probationary period, and thereafter was promoted to head teller and then assistant branch manager. She worked at the Northeast Branch of Capital from September 1974 until September 1978 when she took indefinite sick leave. She was finally discharged from the bank on or about November 1978.

Vinson contends Taylor was like a

fatherly figure during her probationary period and he never demanded sexual favors throughout this period. She testified that in May 1975 he took her to dinner at a local Chinese restaurant, and during dinner he suggested after dinner they go to a motel for the purpose of having sexual relations. She resisted but he insisted and after dinner they drove to a motel where she waited outside in his automobile while he registered. He then took her to a room, asked her to wait while he showered, which she did, and then they engaged in sexual relations. She did so only because she was afraid that failure to grant him a sexual factor would result in her dismissal from the job. (emphasis added) Thereafter, he made repeated demands upon her for sexual favors. She testified that she was forced

to engage in sexual relations with him at the bank during and after banking hours, that they engaged in intercourse in the bank vault, in other rooms at the bank, and in a storage area in the bank basement, that all of these activities were against her will, and that he often actually assaulted or raped her. She states that on one occasion in May 1977 he so brutally raped her that it led to serious vaginal bleeding for which she was required to seek a doctor's care. Taylor allegedly had intercourse with Vinson some 40 or 50 times between May 1975 and 1977. She contends that he stopped making sexual demands upon her only when she started going with a steady boyfriend and that he made no further sexual demands upon her after 1977. Vinson testified Taylor touched and fondled other women employees

of the bank or made suggestive remarks in their presence. Taylor advised Vinson in 1977 she would be given her own Branch Managership and he advised her in June 1978 she would be promoted to Branch Manager in December 1978 and assigned to the Tacoma Park Branch. Vinson never reported Taylor's demands, harassment or activities to any of his supervisors and never attempted to utilize the bank's complaint procedure because she was afraid of Taylor and because he had threatened to have her raped like Christine Malone, another employee of the bank, and had threatened her life.

Taylor denied Vinson's allegations. he testified he never fondled her, never made suggestive remarks to her and never engaged in a sexual relationship with her and never asked her to do so. He

stated he did take Vinson and Christine Malone to lunch on one or more occasions but he never took Vinson alone. He also testified Vinson made advances to him which he declined. He contends he had a problem when Vinson took too much sick leave and in June of 1978, when Vinson was the assistant branch manager of the Northeast Branch and he was the Manager, he had instructed her to train a Dorothy McCallam to be a head teller. Vinson resisted that instruction and attempted to train a Karen Kirkland and not Ms. McCallam while Taylor was on vacation but when Taylor returned from his vacation he contends he found Vinson had attempted to train Ms. Kirkland and not Ms. McCallam. He argued with Vinson over her refusal to train Ms. McCallam and he surmises Vinson has brought these charges against him be-

cause she was seeking to get even with him because of his instruction that she train McCallam. (emphasis added)

The bank denied the allegations made by Vinson and argues that in the event sexual advances were made by Taylor, they were not with the consent or approval of the bank, and such activities were unknown to the bank. The bank offered evidence to show that no complaint had been made to the bank either by Vinson or any other female employee of the bank.

Vinson contends the bank received notice in one of three ways. First she contends Christine Malone advised Mr. Burton, the Vice President of the bank in 1974 when she left the bank, and she further advised the bank through her attorney, Mr. John Verchot, when Verchot wrote the bank on behalf of Ms. Malone

and complained about sexual harassment to Mr. Burton. Third, Vinson contends that the primary actor in this case, Sidney Taylor, a named defendant, was her supervisor and a Branch Manager of the bank and an Assistant Vice President, that alone is sufficient notice to the bank.

The Court refused to believe either Ms. Malone or Ms. Levarity and rejected Vinson's argument that notice to Taylor was notice to the bank. (App.30a-34a; 37a-41a)

REASONS FOR DENYING THE WRIT

I

EVERY CIRCUIT WHICH HAS CONSIDERED THE ISSUE HAS RULED SEXUAL HARASSMENT, WHETHER OF THE "HOSTILE ENVIRONMENT" OR "QUID PRO QUO" TYPE, IS SEX DISCRIMINATION PROHIBITED UNDER TITLE VII.

Although Petitioner appears to be asking this Court to rule that any form of sexual harassment, whether of the "hos-

tile environment" variety or of the type in which employment is conditioned on the actual giving of a sexual favor, called a "quid pro quo" case in the decisional law, is an expansion of **Title VII** which was not intended by Congress when it enacted the **1964 Civil Rights Act.** However, in the question presented, it appears the bank is asking only that the Court consider whether the "hostile environment" kind of case is one which should not be actionable under Title VII as a form of prohibited sex discrimination. See **Petition for Writ of Certiorari ("Pet."), p.(i), p.7.**

This Court ought not to accept the Petition for Writ of Certiorari on this question inasmuch as every circuit called upon to decide the issue of whether sexual discrimination is actionable under Title VII as a form of sex discrimination has

determined that it is, whether it is of the "hostile environment" kind of case or the kind of case where the supervising employee actually demands sexual favor in exchange for the continued employment of the subordinate employee.

Those circuits include the following: Third Circuit, **Tomkins v. Public Service Electric and Gas Company, 568 F.2d 1044 (1977); Craig v. Y.& Y. Snacks, Inc., 721 F.2d 77 (1983);** Fourth Circuit, **Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (1977) (per curiam), Katz v. Pole, 709 F.2d 251, (1983);** Seventh Circuit, **Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (1985);** Ninth Circuit, **Miller v. Bank of America, 600 F.2d 211 (1979);** Eleventh Circuit, **Henson v. City of Dundee, 682 F.2d 897 (1982);** and, of course, the District of Columbia Circuit,

Barnes v. Costle, 561 F.2d 983 (1977), and Bundy v. Jackson, 641 F.2d 934 (1981.

Further, in Henson, supra, 682 F.2d at 902 the Court also concluded that a "... hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII, ..." The Henson Court like the Bundy Court, supra, 641 F.2d at 943-945, reasoned by analogy from the racially-hostile work environment cases and concluded, just as Bundy did, that "... equating illegal sex discrimination with a hostile work environment caused by sexual harassment 'follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially [racially] discriminatory work environment, regardless of whether the complaining employees lost any tangible

job benefits.' [Bundy, supra,] at 943-44 (citing Rogers v. EEOC, 454 F.2d at 238) (emphasis omitted)." Henson, supra, at 902

Vinson is both a quid pro quo and hostile environment case which Petitioner chooses to ignore. Vinson testified she had to engage in sexual intercourse with Taylor in order to keep her job. See p.4 of this opposition. Further, while we agree this is a sexually-demeaning environment case in that Vinson also testified not only she but other women were subjected to sexual innuendoes, insults, fondling, and other unwelcome sexual advances by Taylor, nonetheless, the continued and repeated acts of rape are acts which constitute more than just a sexually-demeaning work environment. They are attacks against the very person of this

woman. As will be argued infra in Part II of this opposition dealing with employer liability under Title VII, it is precisely because the hostile environment was all pervasive and the acts of Taylor so extreme and abhorrent that the bank should have known about the extreme misconduct its manager and assistant Vice President at the Northeast Branch engaged in.

The Equal Employment Opportunity Commission ("EEOC") early on determined that sexual harassment was a form of prohibited sex discrimination under Title VII and provided a set of guidelines regarding prohibited sexual harassment in the work place. See App. 53a-55a; 29 C.F.R. §1604.11(a-f) (1984)

This Court suggested in General Electric Co. v. Gilbert, 429 U.S.125, 141-42, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976),

the degree to which courts should defer to the EEOC's interpretation of Title VII:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncement, and all those factors which give it power to persuade, if lacking power to control."

No circuit which has considered the EEOC guidelines on sexual harassment has rejected them. Consider, for example, Horn, supra, 775 F.2d at 604; Bundy, supra, 641 F.2d at 947; Henson, supra, 683 F.2d at 903.

In conclusion, there is no reason for this court to accept certiorari on the question of whether sexual harassment of

any nature constitutes a form of sexual discrimination prohibited under Title VII since there is no conflict among the circuits, and all are agreed sexual harassment in the workplace constitutes a cause of action under Title VII. EEOC, the executive agency responsible for the enforcement of Title VII, has also ruled that sexual harassment is a form of sex discrimination forbidden under Title VII. To rule otherwise would be to upset a well-established body of decisional and administrative law, both state and federal. We ask therefore that the Petition for Writ of Certiorari on this question be denied.

II

TO HOLD THE EMPLOYER STRICTLY LIABLE UNDER TITLE VII FOR ACTS OF SEXUAL HARASSMENT COMMITTED BY ITS SUPERVISORY PERSONNEL IS IN ACCORDANCE WITH TITLE VII LAW.

Although Petitioner argued there is a conflict among the circuits regarding the sole-called "notice requirement" in sexual harassment cases, as will now be demonstrated, that conflict is only apparent and not genuine. Further, as already argued in Part I of our Opposition, p. 13, because Petitioner appears to present this case as involving only a hostile environment case and not both a hostile environment and quid pro quo case, which it is, it is difficult to ascertain whether Petitioner is arguing the notice requirement should be required only in a hostile-environment case or it is insisting the notice requirement be met in both quid pro quo and hostile-environment cases. See, for example, Pet. pp. 8-9.

Petitioner argues that the absolute employer liability rule established by the

District of Columbia Circuit in Vinson below conflicts with the notice requirement adopted by the Third, Fourth, and Eleventh Circuits. Pet., p. 8

However, Petitioner's interpretation of the Third Circuit's holding in Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983) is to the contrary of what the Seventh Circuit says Craig stands for.

In Horn, supra, 755 F.2d at 604, the Seventh Circuit states:

> "Although the Third Circuit originally suggested that actual or constructive knowledge of the employer might be appropriate, [citation omitted], that circuit has recently repudiated such a requirement, See, Craig v. Y.& Y. Snacks, 721 F.2d 77, 80 (3d Cir. 1983)." (emphasis added)

At footnote 7, also at page 604 of this opinion, the Seventh Circuit explains why it concludes the Third Circuit had repudiated its notice requirement first

articulated in Tomkins, supra, 568 F.2d at 1048-1049, in Craig:

> "Although the Third Circuit did not overrule Tomkins or repudiate the rhetorical standard adopted in that case, it redefined the 'constructive' knowledge component in a way that allowed the court to shift from a fault-based liability standard to one of strict liability. The Court reasoned that where the supervisor has 'unbridled authority to retaliate against an employee,' the employer has 'constructive notice' of the harassment, and is therefore subject to Title VII liability. Craig, 724 F.2d at 80-81." (emphasis added)

Under the notice requirement whether stated in Tomkins, Henson, supra, 682 F.2d at 905, or Katz, supra, 709 F.2d at 255, one of the ways of establishing constructive knowledge on the part of the employer is by showing the "...pervasiveness of the harassment,..." Henson, Id.

In this case, the acts of Taylor were so egregious and brutal that it is clear he had "unbridled authority to retaliate

against an employee", inasmuch as he required Vinson, according to her testimony, to engage in sexual intercourse with him in exchange for hiring her at the Northeast Branch, and repeatedly raped her, even causing her to bleed from her vagina.

Also, in this case there was evidence of actual notice given by former employees of the bank, Mary Levarity and Christine Malone, to the Vice President of the bank, Mr. Burton, but the court chose to find it not credible. App. 38a-39a

Even if the so-called "Notice Requirement" as expressed above were applied to the facts of this case, it has been more than met, and the bank would be liable, even under Petitioner's interpretation of the Notice Requirement.

Further, the circuits which impose a

Notice Requirement in sex harassment cases appear to do so only in hostile-environment cases, but not in quid pro quo cases. **See Katz, supra, 709 F.2d at 255, Ftn. 6; Henson, supra, 682 F.2d at 905.**

Thus, this case on the facts alleged by Vinson would be inappropriate for consideration of the absolute employer liability rule in that we meet the notice requirement, both actual and constructive, articulated by **Tomkins, Katz, and Henson**, and because it is both a quid pro quo and hostile environment case.

Nonetheless, there is no reason for imposing a requirement on a subordinate employee complaining cf sexual harassment to prove the employer had actual or constructive notice of the sexual misconduct on the job by its supervisory personnel. To do so, would impose an additional

requirement on victims of sexual harassment imposed on no other victims of sexual or other kinds of discrimination under Title VII.

Generally, because the thrust of Title VII is directed towards employers, most courts and the EEOC have held an employer is strictly liable under Title VII for the discriminatory acts of its supervisory employees, regardless of whether the employer has actual knowledge of the discriminatory act of its agent. See, for example, **Miller** v. **Bank of America**, supra; **Flowers** v. **Krouch-Walker Corp.**, **552 F.2d 1277, 1282 (7th Cir. 1977)**; **Young** v. **Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1975).**

The EEOC recognized that in making an employer responsible for sexual harassment by its supervisors, it simply was

"[a]pplying general Title VII principles." 29 C.F.R. §1604.11(d). As the Third Circuit pointed out in **Craig**, **supra**, **721 F.2d at 80-81:**

> **"It is widely recognized in racial discrimination cases that an employer is liable as a principle for Title VII violation. [citations omitted]... no different rule is appropriate in sexual harassment claims as long as the distinction between purely personal conduct and conduct having direct employment consequences set forth in Tomkins is observed."**

In **Craig**, the Third Circuit observed that to require an employee to notify the employer's Chief Executive Officer of every act of sexual harassment committed by her supervisor in order to preserve the employee's rights in the event of future retaliation, would **"...vitiate the reference to 'constructive notice' in Tomkins and would lead to incongruous results." 721 F.2d at 81**

To require that an employer have an opportunity to correct a situation involving sexual harassment before it will be held responsible for the illegal acts of its supervisors would be tantamont to establishing an exhaustion requirement in harassment cases beyond those set in Title VII. Attempts to add preconditions to Title VII suits beyond those in a statute consistently have been rejected by this court. **See**, for example, **McDonnell Douglas Corp.** v. **Greene**, 411 U.S. 792 (1973).

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Just as the Ninth Circuit held in **Miller** v. **Bank of America**, **supra**, 600 F.2d at 213 that the Bank of America was responsible for sexual harassment by a super-

visor, the victim did not file a grievance with the bank, and the supervisor's acts were clearly contrary to the bank's established equal employment policies, so the D.C. Circuit held in **Vinson**. This is and ought to be the correct holding, regardless of whether the employer had actual or constructive knowledge of the supervisor's sexual misconduct on the job.

Finally, Petitioner misrepresents the requirement of proof of discriminatory motive in desparate treatment cases, implying the motives of supervisors cannot be imputed to the employer once the supervisor's motive or discriminatory intent is proven. Petitioner provides no authority for this proposition, nor can it do so. The bank, like the employer in **Horn**, **supra**, 755 F.2d at 604-605, has reified the "company", thus "...invit[ing]

an ill-advised descent into the world of legal fiction. The 'company' is a legal form; it can 'act' only through its duly-appointed agents."

III

THE COURT OF APPEALS DID NOT RULE THAT EVIDENCE OF COMPLAINANT'S CONDUCT WAS INADMISSIBLE.

Contrary to the arguments of Petitioner, the Court of Appeals below did not hold that evidence of the voluntariness of Vinson's conduct or response to the sexual advances made by Taylor were inadmissible. In fact, at footnote 68, App. 17a, the Court stated:

> **"In determining the appropriateness of attribution, enough specificity must be imparted to 'harassment' to filter out personal relationships that are not products of employment-related intimidation. For purposes of this case, we are well served by the criteria reflected in the EEOC guidelines. See 29 C.F.R. §1604.11(a) (1984),.... The touchstone of these criteria is that**

> **sexual advances must be unwelcome, and must in some way amount to an explicit or implicit term or condition of employment in the sense either of job status or work environment.' (emphasis added)**

This is in accordance with the Henson Court which lists as one of the elements in a prima facia case of a sex harassment suit that **"....(2) The employee was subject to unwelcome sexual harassment...."**

682 F.2d at 903

Petitioner misreads the opinion where the court discusses whether a woman employee needs to prove **"resistance to sexual overtures in order to establish a title VII claim of sexual harassment."**

App.9a

Because Vinson engaged in sexual intercourse to keep her job, that is, capitulated and gave up further resistance to Taylor's demands does not and cannot mean Vinson welcomed the sexual

advances of Taylor.

> **"This is somewhat analogous to asking how ardently a woman must resist rape before she will be considered to have resisted, that is, not to have consented to it...**
>
> **"With sexual harassment, rejection proves that the advance is unwanted but also is likely to call forth retaliation, thus forcing the victim to bring intensified injury upon herself in order to demonstrate that she is injured at all." C. MacKinnon, Sexual Harassment of Working Women, p. 46**

Inasmuch as the Court of Appeals indicated the complaining employee must prove sexual advances were unwelcomed in her case, the request for certiorari in this instance has no merit and ought to be denied.

IV

EVIDENCE OF VINSON'S DRESS AT WORK OR DISCUSSIONS OF SEXUAL MATTERS OUGHT TO BE INADMISSIBLE IN TITLE VII SEXUAL HARASSMENT CASES.

Petitioner complains it ought to be entitled to introduce evidence of how the

complaining woman employee [1/] dressed at work or evidence of her discussions regarding sexual matters. **Pet. p.11** The Court of Appeals rightly held such evidence has no such place in litigation involving sexual harassment. **App. 9a, N.36**

In 1978, **Rule 412** of the **Federal Rules of Evidence** was added to the **Code.** The Rule deals with the admissibility of the rape victim's sexual conduct in the past. On October 10, 1978 a discussion took place on the floor of the **House**

1/ Even to assert Vinson's manner of dress at work as relevant evidence is sexist and subjects a woman litigant to double discrimination: on the job and then, later in the courtroom. Sexism should be outlawed everywhere including in litigation, particularly where sex discrimination is at issue. Surely, Petitioner cannot, with a straight face, claim it would be insisting today on introducing evidence of Vinson's dress if Vinson had been a man. Petitioner never attempted to introduce evidence of Taylor's dress to show he was a gentleman or circumspect in his conduct.

concerning this rule. The representatives were extremely concerned about the exposure of the victim's private life in a rape case. "...**The principle purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives. It does by narrowly circumscribing when such evidence may be admitted.**" Further, Congressperson Holtz, the author of the bill, stated:

> "**Too often in this country, victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself.**" **124 Cong. Record at P.H. 11944**

Likewise, many victims of sexual harassment do not bring cases against their former employers, because, in many instances, they have acquieseced in the

sexual misconduct demanded by their supervisors for fear of losing their job, or they fear their private lives will be publicized in the courtroom, and they will be humiliated once more.

Thus, while evidence of whether **Vinson** welcomed or invited the sexual advances of **Taylor** is admissible, **Vinson's** dress or her discussions of sexual matters unrelated to **Taylor** are irrelevant, and therefore have no place in her sex harassment litigation.

V

CONCLUSION

While we agree with Petitioner that the issues presented are important and directly impact on employers and employment relations, that employment discrimination claims are significant to the business of federal courts, we do not

agree the issues presented are so unsettled among the circuits that this court should accept certiorari in this case.

Sex harassment is uniformly recognized by all the circuits which have decided the issue as well as by the EEOC as a form of sex discrimination prohibited under Title VII; the absolute employer liability rule articulated in this case is a sound one, grounded in Title VII precedent; and restricting evidence in Title VII cases as the Court of Appeals below did is reasonable.

For the foregoing reasons, this Court should deny the petition for Writ of Certiorari.

Respectfully submitted,

Dated at Grover City, California this 26th day of August 1985.

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REPLY

BRIEF

Supreme Court, U.S.
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No. 84-1979

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PSFS SAVINGS BANK, FSB,
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. Respondent Attempts to Trivialize the Questions Presented by Misstating Proven Facts	1
II. Contrary to Respondent, the Law Applicable to Title VII Sex Discrimination Claims is Unsettled	3
III. Respondent Misstates the Court of Appeals' Evidentiary Rulings	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:	Page
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)	2, 3
Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983)	4
Gan v. Kepro Circuit Systems, Inc., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. Jan. 7, 1982)	5
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)	4
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	4

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

I. Respondent Attempts to Trivialize the Questions Presented by Misstating Proven Facts

A distinctive feature of this sex discrimination case, which shapes each of the questions presented by petitioner for review, is the absence of so-called "*quid pro quo*" discrimination. The District Court found that Respondent Mechelle Vinson ("Vinson") "achieved her promotions based solely on her merits as an employee" (App. at 31a), that she was not "required or asked to give sexual favors in order to obtain promotions" (App. at 31a), and that she "was not required to grant . . . sexual favors as a condition of . . . her employment" (App. at 42a). Those findings were accepted by the Court of Appeals as part of the predicate for its holding. After discussing what it characterized as "two separate avenues" open to a Title VII plaintiff claiming sex discrimination —namely, the withholding of tangible job benefits, or the creating of a sexually harassing environment without the withholding of tangible benefits—the appellate court,

quoting its earlier opinion in *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981), said:

> Vinson's grievance was clearly of the latter type and, accordingly, her cause counseled an inquiry as to whether Taylor [Vinson's supervisor] 'created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination.'

Vinson v. Taylor, 753 F.2d 141, 145 (D.C. Cir. 1985) (App. at 6a-7a) (footnotes omitted). According to the Court of Appeals, it was the District Court's failure to make the requisite environmental inquiry that necessitated reversal and remand.[1]

Vinson fails to address the issues that necessarily arise from the District Court's findings referred to above. Instead, by repeatedly misstating proven facts and by citing her own disbelieved trial testimony, she attempts to give the impression that the case involves only ordinary, well-settled discrimination claims not worthy of certiorari. For example, she says in her Brief in Opposition (hereinafter, "Brief" or "Br.") that she engaged in sexual relations "*only because she was afraid that failure to grant him a sexual factor* [sic] *would result in her dismissal from the job*" (Br. at 4, emphasis in original). At Br. 20 she claims she was "required . . . to engage in sexual intercourse . . . in exchange for hiring her." And at Br. 27, she says that she "engaged in sexual intercourse to keep her job."

With respect to the vicarious liability question, the District Court expressly found that no official of Capital City Federal Savings and Loan Association[2] beyond Respondent Sidney Taylor (the alleged perpetrator) had notice of any harassment or other sexual discrimination against Vinson (App. at 38a-39a, 41a). That finding is critical to the Court of Appeals' holding that employers are absolutely liable for environment-type sex discrimination regardless of notice. *Vinson v. Taylor*, *supra*, 753 F.2d at 147, 150-52 (App. at 12a, 18a, 20a, and 21a). Again, Vinson attempts to trivialize the issue by misstating the facts. She urges at Br. 21, in flat contradition of the factual record, that it is inappropriate to consider a rule of absolute employer liability because here the employer had "both actual and constructive" notice and because the case "is both a *quid pro quo* and hostile environment case."

The District Court also found that any participation by Vinson in a sexual relationship with Taylor was voluntary (App. at 42a). The Court of Appeals did not directly dispute the finding; instead, it held that evidence of voluntariness "had no materiality whatsoever." *Vinson v. Taylor*, *supra*, 753 F.2d at 146 (App. at 9a). In an attempt to avoid facing the issue of whether voluntariness is material to an environment-type sex discrimination claim, Vinson repeatedly characterizes herself as a rape victim (e.g., Br. at 20) and says she participated in the relationship solely through fear of dismissal (e.g., Br. at 4), allegations expressly rejected by the District Court.

II. Contrary to Respondent, the Law Applicable to Title VII Sex Discrimination Claims is Unsettled

Although Title VII has prohibited discrimination "because of . . . sex" since 1964, it was not until 1981 that a federal circuit court first held harassment alone to constitute a Title VII violation. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). The *Bundy* court itself acknowledged the novel and unprecedented nature of its decision. *Id.*, 641 F.2d at 943.

---

[1] The legal sufficiency, *vel non*, of an environment-type claim under Title VII is one of the issues petitioner seeks to bring before this Court.

[2] Effective May 2, 1985, the Association was merged into and is now known as PSFS Savings Bank, FSB, petitioner herein.

The *Bundy* decision, upon which the Court of Appeals' holding in this case is based, finds no explicit support in the language of the statute, nor is there any hint in the legislative history of Title VII that the Congress intended such a novel and unprecedented interpretation of Title VII. This Court has never addressed a Title VII harassment case.

Although Vinson contends (Br. at 17) that there is no genuine conflict among the circuits on the question of absolute employer liability for harassment claims, her Brief shows otherwise. At Br. 20-21, she concedes that the Fourth and Eleventh Circuits both impose an employer notice requirement in hostile environment cases, citing *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983), and *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). Although she attempts to distinguish the Third Circuit decision of *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3rd Cir. 1983) (Br. at 18-19), *Craig* itself makes clear that employer knowledge of harassment is necessary to support a claim against the employer. *Craig, supra*, 721 F.2d at 80.

III. Respondent Misstates the Court of Appeals' Evidentiary Rulings

Vinson seeks to make the Court of Appeals' evidentiary rulings appear sensible by referring to the abstract proposition in that court's opinion that unwelcomeness is the touchstone of an harassment claim (Br. at 26-27). In doing so, however, she ignores the Court of Appeals' specific evidentiary rulings that her voluntary participation in a sexual relationship, and her workplace dress and sexual fantasies and proclivities, were immaterial. *Vinson v. Taylor, supra*, 753 F.2d at 146 and n.36 (App. at 9a and n.36).

Vinson goes on to cite evidentiary principles applicable to rape prosecutions in an attempt to justify the Court of Appeals' rulings (Br. at 28-30). But regardless of

whether provocation and reputation for chastity are relevant in rape cases, a Title VII plaintiff's own sexual conduct at the workplace has obvious, logical pertinence to her claim that she was subjected to unwelcome sexual harassment. *Gan v. Kepro Circuit Systems, Inc.*, 28 Fair Empl. Prac. Cas (BNA) 639, 641 (E.D.Mo. Jan. 7, 1982), where the court said:

> The plaintiff, however, has failed to make a *prima facie* case for constructive discharge based upon sexual harassment. The evidence shows that allegedly harassing conduct was substantially welcomed and encouraged by plaintiff. She actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct. Plaintiff has failed to prove that her working conditions were persoanlly intolerable or that they caused her to quit her job. [Citation omitted.]

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, this Court should issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

F. ROBERT TROLL, JR.
(Counsel of Record)
CHARLES H. FLEISCHER
RANDALL C. SMITH

ROSS, MARSH & FOSTER
888 - 16th Street, N.W.
Washington, D.C. 20006
Tel. (202) 822-8888
Attorneys for Petitioner

Dated at Washington, D.C.
this 4th day of September, 1985

JOINT

APPENDIX

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

JOINT APPENDIX

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Tel. (805) 489-8487
Attorney for Respondent Mechelle Vinson

PETITION FOR CERTIORARI FILED JUNE 21, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Docket Entries from the United States District Court for the District of Columbia (No. CA 78-1793)	1
Docket Entries from the United States Court of Appeals for the District of Columbia Circuit (No. 80-2369)	2
Complaint by Mechelle Vinson, plaintiff, against Sidney L. Taylor and Capital City Federal Savings and Loan Association of Washington, D.C., defendants, Filed on September 22, 1978, CA No. 78-1793	3
Answer to Complaint, Filed by Sidney L. Taylor on November 15, 1978, CA No. 78-1793	7
Answer to Complaint, Filed by Capital City Federal Savings and Loan Association on November 16, 1978, CA No. 78-1793	9
Letter dated June 14, 1978 to Mechelle Vinson from Sidney L. Taylor	13
Letter dated November 1, 1978 to Mechelle Vinson from David G. Burton	15
Letter dated November 1, 1978 from Mechelle Vinson to Capital City Federal Savings and Loan Association	17
Charge of Discrimination dated November 22, 1978, filed by Mechelle Vinson against Capital City Federal Savings and Loan Association	19
Letter dated March 21, 1979 from John Marshall Meisburg, Esquire to Clarence Bell, Esquire	22
Notice of Right to Sue, dated March 28, 1979 to Mechelle Vinson, issued by the Equal Employment Opportunity Commission	23
Equal Employment Opportunity Policy Statement of Capital City Federal Savings and Loan Association	25

NOTE: The appendix filed in support of the petition for a writ of certiorari contains the following ing material, which is omitted from this Joint Appendix:

TABLE OF CONTENTS—Continued

Page

Opinion and Order filed January 25, 1985, of the United States Court of Appeals for the District of Columbia Circuit, No. 80-2369 (Robinson, C.J., Wright, J., and Northorp, J., of the United States District Court for the District of Maryland, sitting by designation) 1a-21a

Order of the United States Court of Appeals, per curiam, and dissenting opinion of Bork, J., joined by Scalia and Starr, JJ., filed May 14, 1985, on suggestion for rehearing en banc 22a-29a

Opinion and Order filed February 26, 1980, of the United States District Court for the District of Columbia, No. CA 78-1793 (Penn, J.) 30a-46a

Excerpts, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Secs. 2000e, *et seq.* (1982) 47a-52a

Excerpts, Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984) 53a-55a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[RELEVANT DOCKET ENTRIES, NO. CA 78-1793]

* * * *

Sept. 22 [1978]	COMPLAINT; Appearance.

* * * *

Nov. 15 [1978]	ANSWER by deft. #1 [Sidney Taylor] to complaint.
Nov. 16 [1978]	ANSWER by deft. #2 [Capital City Federal Savings and Loan Association of Washington, D.C.] to complaint.

* * * *

Feb. 27 [1980]	OPINION filed 2/26/80 . . . JOHN GARRETT PENN, J.
Feb. 27 [1980]	ORDER filed 2/26/80 entering judgment for defts.; dismissing case with prejudice, each party to bear its own costs. . . . JOHN GARRETT PENN, J.

* * * *

Nov. 7 [1980]	NOTICE OF APPEAL by pltf. from judgment entered on 2/26/80 . . . .

* * * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[RELEVANT DOCKET ENTRIES, NO. 80-2369]

* * * *

11/10/80 Copy of notice of appeal and docket entries from Clerk, District Court . . . .

* * * *

01/25/85 Opinion for the Court filed by Chief Judge Robinson.

01/25/85 Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded for proceedings consistent with the Opinion for the Court filed herein this date.

* * * *

05/02/85 Per curiam order that the Clerk is directed to withhold the issuance of this Court's mandate for a period of seven days after disposition of the pending suggestion for rehearing en banc, should that suggestion be denied. . . .

05/14/85 Per Curiam order denying appellees' suggestion for rehearing en banc. . . .

05/14/85 Order denying suggestion for rehearing en banc released in slip opinion form.

05/14/85 Dissenting opinion filed by Circuit Judge Bork.

* * * *

06/07/85 Per curiam order that the motion of appellee Capital City Federal Savings and Loan Association to stay issuance of mandate is granted and the Clerk is directed to withhold issuance of this Court's mandate for a period of 30 days from the date of this order. . . .

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1793

MECHELLE VINSON,
2304 13th Place, N.E., Wash., D.C.,
Plaintiff,

vs.

SIDNEY L. TAYLOR, and
CAPITAL CITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF WASHINGTON, D.C.,
Defendants.

[Filed Sept. 22, 1978]

COMPLAINT

Plaintiff, for her claim for relief against the defendants, states as follows:

Jurisdiction

1. Federal Court Jurisdiction over this claim is based upon Federal Question Jurisdiction, pursuant to Title 28, United States Code, Section 1331.

2. Plaintiff's claim arises under Title 42 United States Code Section 1985(2), Title 42 United States Code, Section 2000e, and the Fifth Amendment to the United States Constitution.

Parties

3. Plaintiff, Ms. Mechelle Venson, is a resident of the city of Washington, District of Columbia, and is currently employed by the Defendant company, Capital City Federal Savings and Loan Association of Washington, D.C. (hereinafter referred to as the "Association".)

4. Defendant Sidney L. Taylor, is also an employee of the Defendant Association, and is Ms. Venson's immediate supervisor.

5. Defendant Capital City Federal Savings and Loan Association of Washington, D.C., is a Federal Insured Savings and Loan Association, doing business at 4301 Connecticut Avenue, N.W., Washington, D.C. 20008, and is a member of the Federal Savings and Loan Insurance Corporation.

Claim

6. Plaintiff has been employed by the Defendant Association for approximately four (4) years.

7. During the aforesaid four years of Plaintiff's employment, she has consistently been rated as an excellent employee, rating a 9-10 on a 10 point scale.

8. During the aforesaid four years of Plaintiff's employment she has also constantly been subjected to sexual harrassment by her supervisor, Defendant Sidney L. Taylor.

9. Specifically, Defendant Taylor has constantly, throughout the entire four year period of Plaintiff's employment sought sexual favors and sexual relations with and from the Plaintiff, as an inducement for retaining her employment with the Association.

10. On numerous occasions, Defendant Taylor has forced the Plaintiff to have sexual intercourse with him using the threat that if she refused she would be terminated from her employment with the Association.

11. The sexual harrassment experienced by the Plaintiff is still continuing up until the present time.

12. In addition to the aforesaid sexual harrassment, Defendant Taylor has now threatened the life of the Plaintiff if she reports any or all of the sexual incidents referred to above.

13. Defendant Taylor has also altered the personnel records of the association to reflect adversely upon the Plaintiff, in order to legitimize possible future adverse action against her.

14. Defendant Taylor has also sexually harrassed numerous other female employees of the Defendant Association, and said conduct constitutes a well-known pattern of behavior which has been known to the officials of the Defendant Association for many years, and which thereby and therefore has been condoned by the Defendant Association.

Prayer for Relief

For relief, Plaintiff prays that this Court should award to her the following:

1. An immediate Temporary Restraining Order, Preliminary and Permanent Injunction, ordering the Defendant Taylor to cease and desist all forms of sexual harrassment and threats of violence against the Plaintiff.

2. Compensatory damages from the Defendant Taylor in the amount of $50,000.00.

3. Punitive Damages from the Defendant Taylor in the amount of $50,000.00.

4. Compensatory Damages from the Defendant Association in the amount of $50,000.0..

5. Punitive damages from the Defendant Association in the amount of $50,000.00.

6. Total damages from the Defendants, jointly and severally in the amount of $200,000.00.

7. Back Pay in the amount provided for by statute, 42 *United States Code* Section 2000e, *et. seq.*

8. The costs of this action.

9. Reasonable attorney's fees, and

10. All other relief that the Court deems appropriate.

Respectfully submitted,

[Signature and verification omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action #: 78-1793

MICHELLE VINSON,
Plaintiff

vs.

SIDNEY L. TAYLOR, and
CAPITAL CITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF WASHINGTON, D.C.,
Defendants

[Filed Nov. 15, 1978]

ANSWER TO COMPLAINT

Comes now the defendant, Sidney L. Taylor by and through his attorney, Harry I. Barnett, and in Answer to the Complaint states as follows:

1. That the defendant denies that this claim is based upon a federal question as alleged in paragraph one (1) of the Complaint and therefore contends that this Court lacks jurisdiction.

2. That the defendant denies further that this claim arises under either Title 42 United States Code, Section 1985(2), Section 2000(e) or under the Fifth Amendment of the United States Constitution as alleged in paragraph two (2) of the Complaint, and states further that this Honorable Court is without jurisdiction to litigate plaintiff's claim.

3. That the defendant is without sufficient information or knowledge as to either admit nor deny the allegations contained in paragraph three (3) of the Complaint.

4. That the defendant admits the allegations contained in paragraphs four (4) and five (5) of the Complaint.

5. That the defendant denies all allegations contained in paragraphs seven (7) through fourteen (14) of the Complaint.

6. That the Complaint fails to state a claim upon which relief can be granted.

7. That the Complaint be dismissed for lack of jurisdiction.

WHEREUPON, defendant prays for the following:

(1) That Plaintiff's complaint be dismissed.

(2) That Plaintiff's claim be dismissed for failure to state a claim upon which relief be granted.

(3) For any other such relief as this Court see fit to be granted to Defendant, Sidney L. Taylor.

(4) The cost of this action and reasonable attorney's fees.

Respectfully submitted,

[Signature and certificate of service omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1793

MECHELLE VINSON,
Plaintiff

vs.

SIDNEY L. TAYLOR
and
CAPITAL CITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF WASHINGTON, D.C.,
Defendants

[Filed Nov. 16, 1978]

ANSWER OF DEFENDANT, CAPITAL CITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF WASHINGTON, D.C.

Capital City Federal Savings and Loan Association of Washington, D.C., (hereinafter sometimes called "Capital City") defendant, by its attorneys, Nylen & Gilmore, for Answer to the Complaint filed herein by Mechelle Vinson, plaintiff, says as follows:

FIRST DEFENSE

This Honorable Court lacks jurisdiction over the subject matter of this proceeding as plaintiff has not met the statutory prerequisites to filing this action for damages, namely, the filing of a Complaint with the Equal Employment Opportunity Commission (EEOC) and the receipt of a right to sue letter.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted as it nowhere alleges specific factual allegations of a conspiracy against plaintiff and members of a class in deprivation of their civil rights, nor does it allege that the conduct of defendant, Capital City Federal Savings and Loan Association constitutes state action or was taken under color of state action.

THIRD DEFENSE

Defendant, Capital City, now and at all times hereinafter saving and reserving unto itself any and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections, and insufficiencies in the plaintiff's Complaint, for answer thereto or unto so much or such part thereof as this defendant is advised that it is material and necessary for it to make answer thereto says that it denies the allegations of jurisdiction set forth in Paragraphs one (1) and two (2) of the Complaint; that the defendant, Capital City is without knowledge or information sufficient to form a belief as to whether the plaintiff is a resident of the City of Washington in the District of Columbia as alleged in Paragraph three (3) of the Complaint, and therefore, denies same; that the defendant, Capital City, denies that the plaintiff, Mechelle Vinson, is currently employed by the defendant as further alleged in Paragraph three (3) of said Complaint; that the defendant admits that the defendant, Sidney L. Taylor, is an employee of the defendant but denies that he is Miss Vinson's immediate supervisor as set forth in Paragraph four (4) of said Complaint; that the defendant admits that it is a federally insured savings and loan association and is a member of the Federal Savings and Loan Insurance Corporation as alleged in Paragraph five (5) of the Complaint; that the defendant admits that the plaintiff at least until November 1, 1978, was in the

employ of the defendant, Capital City as alleged in Paragraph Six (6) of the Complaint; that the defendant denies the allegations of Paragraph seven (7) of the Bill of Complaint insofar as any ten-point scale was used in the rating of employees by defendant; that defendant is without knowledge or information sufficient to form a belief as to whether such ratings were performed by any other person with respect to the plaintiff's employment with defendant, Capital City, and therefor it denies the allegations contained in Paragraph seven (7); that defendant is without any knowledge or information whatsoever as to the allegations of Paragraphs eight (8), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13) of the Complaint, and therefore, denies each and every allegation set forth therein; that the defendant is without knowledge or information sufficient to form a belief as to the allegations of Paragraph fourteen (14) of the said Complaint as such relate to the actions and conduct of defendant, Sidney L. Taylor, and therefore it denies same; that with respect to the remaining allegations of Paragraph fourteen (14) defendant's knowledge with respect to the alleged behavior of defendant, Sidney L. Taylor, and its condonation by the defendant, defendant specifically denies each of said allegations;

FOURTH DEFENSE

Defendant, Capital City, submits that the plaintiff has failed to exhaust her administrative remedies and the statutory prerequisites to the filing and maintenance of this suit.

FIFTH DEFENSE

Any and all injuries cognizable under appropriate Federal law that plaintiff allegedly sustained were not caused by defendant, Capital City, who had no knowledge whatsoever of the alleged behavior of defendant, Sidney L. Taylor, such that his alleged actions, if true, were per-

formed outside the scope and cause of his employment with defendant, Capital City.

SIXTH DEFENSE

Assuming, *arguendo only*, the truth of the allegations set forth in the Complaint as to defendant, Sidney L. Taylor, plaintiff's voluntary acquiescence in and consent to an alleged sexual relationship with defendant, Taylor, and her failure or forebearance in the filing of a Complaint with the Equal Opportunity Employment Commission (EEOC), as required by applicable Federal law, renders her guilty of such laches as should bar her from maintaining this action against defendant, Capital City.

SEVENTH DEFENSE

That the right of action set forth in the Complaint including plaintiff's claim for an award of back pay is barred by limitations.

EIGHTH DEFENSE

Defendant, Capital City, asserts that on the basis of allegations contained in the Complaint, plaintiff is not entitled to any award of punitive damages absent a showing that the alleged actions and/or conduct by defendant, Capital City was willful, intentional, or malicious, and were performed in bad faith for improper motives in gross disregard for her constitutional rights.

Respectfully submitted,

[Signature and certificate of service omitted]

DEFENDANT'S EXHIBIT 7A

CAPITAL CITY FEDERAL SAVINGS
AND LOAN ASSOCIATION OF WASHINGTON, D.C.
Organized 1916

244-3850
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008

June 14, 1978

Mrs. Michelle Vinson
Capital City Federal
Savings and Loan
2010 Rhode Island Avenue, NE
Washington, DC 20036

Dear Mrs. Vinson:

In regard to my telephone conversation with Mr. Burton June 13, 1978, Mr. Burton informed me of the number of sick days that you have taken over a four year period.

Mrs. Vinson, it is needless for me to say that no one can determine when one will be sick; but, if I may quote from the employee manual, "Employees are expected to hold absences due to illness to a minimum and to be in attendance at all times other than prearranged leave periods, and, therefore, excessive absences due to illness may be cause for a termination of employment.

"Employees who have completed their probationary period (90) days will be entitled to (9) days sick leave per calendar year. In the event all sick leave have been used, then the Association can charge your annual leave and, subsequently, will be entitled to leave without pay."

The number of sick days you have taken from 1975 through June 31, 1978, is 49½ days. That is 13 days

over the number of days you have occurred. Please be advised of this situation and work towards correcting it.

Yours truly,

/s/ Sidney L. Taylor
SIDNEY L. TAYLOR
Assistant Vice President

SLT:dmb

DEFENDANT'S EXHIBIT 3B

CAPITAL CITY FEDERAL SAVINGS
AND LOAN ASSOCIATION OF WASHINGTON, D.C.
Organized 1916

244-3850
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008

November 1, 1978

Mrs. Michelle A. Vinson
2304 13th Place, N.E.
Washington, D.C.

Dear Mrs. Vinson:

This will confirm our telephone conversation of October 15, 1978 in which I stated the necessity for you to come to my office to discuss your current leave status and how the excessive use of such leave has adversely affected your position at Capital City. This meeting is necessary to initiate corrective action on your part to improve your job performance.

Since your employment on September 9, 1974 you have used sick leave as follows:

1974	8 days
1975	23 days 4 hours
1976	4 days 5 hours
1977	4 days 3½ hours
1978	11 days 5½ hours (through August)
	52 days 2 hours

Association policy recognizes the need to provide for the occasions when an employee unavoidably becomes ill by providing 9 days leave per year for this purpose. However, in your case you have used 52 days 2 hours

sick leave through August 1978 and are only entitled to 36 days; this does not account for the time your have missed since September 21, 1978 (which we have been told by you is sick leave for an indefinite period of time).

Needless to say, the Association has been understanding of your personal health problems by extending sick leave to you, with pay, in consideration of your tenure. However, as I explained to you, your continued absences have placed a burden on the Northeast Office and its employees. Consequently, it is imperative that we act immediately to improve the situation in order to provide better service to the customers served by the Northeast Office.

In as much as you have refused to meet with me to discuss this problem, we assume that you have elected to voluntarily terminate your employment with the Association and we will consider you no longer employed as of this date.

Very truly yours,

/s/ David G. Burton
DAVID G. BURTON
Vice President

DGB:jh

PLAINTIFF'S EXHIBIT 9

MECHELLE ANN VINSON

NOVEMBER 1, 1978

CAPITAL CITY FEDERAL SAVINGS & LOAN ASSN.
4300 CONNECTICUT AVENUE N.W.
VAN NESS CENTER
WASHINGTON, D.C. 20008

ATTN: BOARD OF DIRECTORS
RE: CONSTRUCTIVE RESIGNATION

DEAR SIRS:

DUE TO THE LEVEL OF HARRASSMENT AND THE UNPROFESSIONAL ATMOSPHERE THAT EXISTS IN MY DIRECTION AT YOUR NORTHEAST OFFICE, I AM FORCED TO SUBMIT THIS LETTER OF CONSTRUCTIVE RESIGNATION; TO TAKE EFFECT IMMEDIATELY.

I AM ENCLOSING A SET OF FIVE KEYS BY CERTIFIED MAIL. THESE KEYS ARE TO THE NORTH EAST OFFICE, TO INCLUDE:

(1) TWO KEYS TO MY ASSIGNED CASH DRAWER (#4R40521) (C010)

(2) TWO KEYS TO THE FRONT DOOR (#357) (#Y1)

(3) ONE KEY TO THE MIDDLE OFFICE DOOR (Y199)

I HAVE NO OTHER PROPERTY OF CAPITAL CITY SAVINGS.

I WILL MAKE ARRANGEMENTS FOR MYSELF AND/OR MY PERSONAL REPRESENTATIVE TO SECURE ANY PERSONAL PROPERTY FROM YOUR

PREMISES WITHIN THE DAILY OPERATING HOURS OF THE NORTHEAST BRANCH.

THANK YOU,

MECHELLE A. VINSON

CC: BOARD OF DIRECTORS
CC: DAVID BURTON, VICE PRES.
CC: SIDEY L. TAYLOR, ASST. VICE PRES.
CC: FILE COPY
CC: ATTORNEY, JOHN MARSHALL MEISBURG, JR., 1101 CONNECTICUT AVE. N.W.

PLAINTIFF'S EXHIBIT 6

CHARGE OF DISCRIMINATION

IMPORTANT: This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.

Equal Employment Opportunity Commission

Name Ms. Mechelle Ann Vinson

Street Address 2304 13th Place, N.E.

City, State, and Zip Code Washington, D.C. 20018

Home Telephone Number (202) 529-3932
(202) 529-8630

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

Name Capital City Federal Savings & Loan Association

Street Address 2010 Rhode Island Ave., N.E.

City, State, and Zip Code Washington, D.C. 20018

Telephone Number (202) 244-3850

CAUSE OF DISCRIMINATION BASED ON MY
(Check appropriate box(es)

☐ RACE ☐ COLOR ☒ SEX F ☐ RELIGION
☐ NATIONAL ORIGIN ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (*Month, day, and year*)—Over 15 employees—11-01-78

11-01-78

THE PARTICULARS ARE:

1. I was hired September 9, 1974 as a Teller. For Capital City Federal Savings and Loan Asso. Throughout my employment with the company I was continually sexually harrassed by Mr. Sidney L. Taylor, Assistant Vice-President. As a result, of Mr. Taylor's Sexual harrassment, I was forced to resign effective Nov. 1, 1978.

2. I believe that I have been discriminated against because of my sex, female, in that:

   (a) From May 1975 until Sept. 20, 1978 I was continually sexually harrassed by Mr. Sidney L. Taylor in the following manner:

      1. Mr. Taylor threatened to fire me if I did not submit to his sexual advances.

      2. Mr. Taylor altered my personnel records by reporting me late or absent when I was not late or absent.

      3. Mr. Taylor threatened my life.

      4. I was harrassed by my personal property being tampered with.

      5. To my knowledge, male employees of. Capital City Federal Savings and Loan Asso. were never subjected to sexual harrassment as was I.

      6. There were 3 females and 1 male employed by Capital City Federal Savings & Loan Asso. at that facility, at the time I was forced to resign.

      7. Capital City Federal Savings & Loan Assoc. has harrassed me by submitting information to the U.S. Unemployment Compensation Office which stated I resigned because

of ill health. This action has prevented me from receiving appropriate unemployment compensation.

   (b) As a result of the sexual harrassment by Mr. Taylor, I submitted to his sexual demands. The pressure became so severe I was forced to resign, effective Nov. 1, 1978.

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I swear under penalty of perjury that the foregoing is true and correct.

/s/ Mechelle A. Vinson

Nov. 22, 1978

DEFENDANT'S EXHIBIT 35

JOHN MARSHALL MEISBURG, JR.
Attorney and Counselor at Law
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036

(202) 833-1445

March 21, 1979

Clarence Bell, Esq.
U.S. EEOC
1717 H Street, N.W.
Washington, D.C.

Re: Mechelle Vinson v. Capital City Federal Savings & Loan; Charge No. ————

Dear Sir:

Please issue a right to sue letter in the above-styled case. The charge number was not clearly xeroxed and cannot be seen on the copy, but the charge, as attached was filed in your office on November 22, 1979, about 120 days ago.

Thank you for your assistance and cooperation. Time is important here because we are already in court on this matter under 42 U.S.C. Section 1985(3) and wish to amend the Complaint to include Title VII.

Very truly yours,

/s/ John Marshall Meisburg, Jr.
JOHN MARSHALL MEISBURG, JR.

Enclosure

EQUAL EMPLOYMENT COMMISSION
NOTICE OF RIGHT TO SUE

TO:

Ms. Mechelle A. Vinson
c/o John Marshall Meisburg, Jr.
Attorney and Counsel at Law
1101 Connecticut Ave., N.W.
Washington, D.C. 20036

FROM:

Equal Employment Opportunity Comm.
Washington Area Office
1717 H St., N.W., Suite 400
Washington, D.C. 20006

Charge Number 032-790177

EEOC Representative Clarence Bell, Area Director

Telephone Number (202) 653-6197

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☒ Less than 180 days have expired since the filing of this charge, but I have determined that the Commis-

sion will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the end of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ Clarence Bell
CLARENCE BELL
Washington Area Office
(Typed Name and Title of EEOC Official)

3/28/79

cc: Edward Nylen, Acting President
Capital City Federal Savings & Loan Assn.
2010 Rhode Island Avenue, N.E.
Washington, D.C. 20018

DEFENDANT'S EXHIBIT 5

EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

We of the Capital City Federal Savings and Loan Association of Washington, D.C. shall pursue a definite course of action to seek and employ the best qualified personnel without discriminating against any person because of race, color, religion, sex, age or national origin. All employment decisions will provide all employees with opportunities for advancement, including upgrading, promotion and training.

The Capital City Federal Savings and Loan Association of Washington, D.C. will proceed affirmatively to recruit, hire, train, promote and institute all personnel policies, conditions and benefits in all job classifications without regard to race, color, religion, sex, age or national origin.

We will expect each of you to carry out your work responsibilities and conduct your relationships with fellow employees in a manner which reflects the highest ethical standards.

We have designated, David G. Burton, Vice President to direct the implementation of the Affirmation Action Program and to make periodic reports to the Board of Directors on its success. The responsibility for implementing this Equal Employment Opportunity policy in all divisions of the Capital City Federal Savings and Loan Association of Washington, D.C. rests with each officer and department head.

CAPITAL CITY FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF WASHINGTON, D.C.

BOARD OF DIRECTORS:

/s/ Edward W. Nylen
EDWARD W. NYLEN
Chairman

/s/ A. Frank P. Rubino
A. FRANK P. RUBINO
Vice Chairman

/s/ George J. Boyce
GEORGE J. BOYCE

/s/ Joseph E. Bruno
JOSEPH E. BRUNO

/s/ James S. Long
JAMES S. LONG

/s/ George G. H. McDaniel, Jr.
GEORGE G. H. MCDANIEL, JR.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1979

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF PETITIONER

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Is an employer absolutely liable under Title VII of the Civil Rights Act of 1964, as amended, for sexual advances allegedly made by a male supervisor toward a female subordinate where the employer neither knew nor reasonably could have known of, had no opportunity to stop, and did not intend to permit the sexual advances?

II. Is evidence of the complaining employee's workplace dress and voluntary conduct and her sexual fantasies and proclivities admissible in defense of her Title VII claim?

III. Do allegations of sexual advances, without any loss or threatened loss of economic or other tangible job benefits, state a claim of employment discrimination because of sex in violation of Title VII?

LIST OF PARTIES

Meritor Savings Bank, FSB, petitioner, defendant-appellee below.*

Mechelle Vinson, respondent, plaintiff-appellant below.

Sidney L. Taylor, respondent, defendant-appellee below.

---

* Petitioner appeared below as Capital City Federal Savings and Loan Association. Effective May 2, 1985, Capital was merged with Northern Virginia Federal Savings and Loan Association and became known as PSFS Savings Bank, FSB. Effective August 29, 1985, PSFS Savings Bank, FSB, changed its name to Meritor Savings Bank, FSB.

Petitioner's parents, subsidiaries and affiliates (except wholly owned subsidiaries) are: PSFS Thrift Holding Company (owner of all voting stock of petitioner); Federal Savings and Loan Insurance Corporation (owner of income-producing certificates of petitioner); The Philadelphia Saving Fund Society (an affiliate of petitioner); and PSFS Finance, Inc., and First National Real Estate Association Corporation (subsidiaries of The Philadelphia Saving Fund Society).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	10
ARGUMENT	15
I. CONGRESS DID NOT INTEND TO MAKE INNOCENT EMPLOYERS ABSOLUTELY LIABLE FOR TITLE VII SEX DISCRIMINATION	15
A. Employer Liability Under Title VII For Discriminatory Treatment Because Of Sex Requires Proof Of Intent	15
B. The Bank Did Not Intend To Discriminate	21
C. EEOC Guidelines On Employer Liability For Title VII Sex Discrimination Offer No Guidance To Interpreting The Statute	22
II. EVIDENCE OF VOLUNTARY SEXUAL CONDUCT AND WORKPLACE DRESS, SEXUAL FANTASIES AND PROCLIVITIES WAS PROPERLY ADMITTED AS PROOF THAT VINSON WAS NOT A VICTIM OF SEX DISCRIMINATION	26
III. CONGRESS DID NOT INTEND TO REGULATE PURELY PSYCHOLOGICAL ASPECTS OF THE WORKPLACE ENVIRONMENT UNDER TITLE VII	30
CONCLUSION	37

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 22, 30, 31
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 22
Anderson v. City of Bessemer City, —— U.S. ——, 105 S.Ct. 1504 (1985) 17, 29
Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 34
Barnes v. Costle, 561 F.2d 983 (D.C.Cir. 1977) 18, 21, 27
Barrett v. Omaha Nat. Bank, 726 F.2d 424 (8th Cir. 1984) 18, 21, 35
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) 16
Bundy v. Jackson, 641 F.2d 934 (D.C.Cir. 1981) 8, 9, 14, 19, 21, 29, 35
City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) 33
Clark v. World Airways, Inc., 24 Fair Empl. Prac. Cas. (BNA) 305 (D.D.C. 1980) 20
Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) 18, 21, 35
Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985) 35
Evans v. National Post Office Mail Handlers Union, 32 Fair Empl. Prac. Cas. (BNA) 634 (D.D.C. 1983) 28
Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979) 35
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 16
Gan v. Kepro Circuit Systems, Inc., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D.Mo. 1982) 28
General Bldg. Contr. Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 19
General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977) 22, 23
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 16, 31
H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941) 19
Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977) 36
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 11, 17, 20, 21, 35

TABLE OF AUTHORITIES—Continued

Page

Hishon v. King & Spalding, 467 U.S. 69 (1984) 34
Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985) 19, 35
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 16
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 18, 21, 35
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 16, 31, 32
Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) 35
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 31
Patton v. J. C. Penney Co., 215 Daily Lab.Rep. (BNA) A-1 (Ore.App. 1985) 22
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 33
Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) 34, 35
Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981) 36
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 22
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 17
U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983) 17
Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 19
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), *reh'g denied*, 456 U.S. 940 (1982) 32

Constitution and Statutes:

U.S. Const. amend. V 3
28 U.S.C. § 1254 (1982) 2
National Labor Relations Act, as amended, 29 U.S.C. §§ 151-167 (1982) 19
42 U.S.C. § 1981 (1982) 19
42 U.S.C. § 1985 (1982) 3
Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1982) ..... *passim*

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

J. Butler, "Memorandum of EEOC General Counsel," *reprinted in* 210 Daily Lab.Rep. (BNA) E-2 (Oct. 30, 1985) 25
110 Cong. Rec. 2577-79 (Feb. 8, 1964) 32, 33
110 Cong. Rec. 7212 (Apr. 8, 1964) 33
110 Cong. Rec. 8177 (Apr. 16, 1964) 15
110 Cong. Rec. 12723-24 (June 4, 1964) 16
1 Davis, Administrative Law Treatise, § 5.05 (1958) 25
EEOC Decs. No. 70-432, EEOC Decisions (CCH) ¶ 6130 (1970) 24
EEOC Decs. No. 72-0779, EEOC Decisions (CCH) ¶ 6321 (1973) 25
EEOC Decs. No. 84-1, EEOC Decisions (CCH) ¶ 6839 (1983) 28, 29
30 Fed. Reg. 14926 (1965) 22
33 Fed. Reg. 3344 (1968) 23
37 Fed. Reg. 6836 (1972) 23
44 Fed. Reg. 23804 (1979) 23
45 Fed. Reg. 25024 (1980) 23
45 Fed. Reg. 74676 (1980) 23
Fed.R.Evid. 412 28
Fed.R.Evid. 607 28
Fed.R.Evid. 608 28
Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604.11 (1984) 11, 13, 22, 23, 24, 27
H.R. 7152, 88th Cong., 1st Sess. (1963) 15, 32, 33
H.R. 1746, 92d Cong., 1st Sess. (1971) 33
H.R. Rep. No. 238, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137 33
110 Lab.Rel.Rep. (BNA) 270-71 (1982) (News and Background Information) 25
Restatement (Second) of Agency § 217D, comment *d* (1958) 21
Restatement (Second) of Agency § 268 and comment *c* (1958) 20
Restatement (Second) of Torts § 909 (1979) 21

TABLE OF AUTHORITIES—Continued

Page

R. Silberman, "EEOC Memorandum on PSFS Savings Bank, FSB v. Vinson," *reprinted in* 210 Daily Lab.Rep. (BNA) E-1 (Oct. 30, 1985) 25
J. Smith, "Prologue to the EEOC Guidelines on Sexual Harassment," 10 Cap. U.L. Rev. 471 (1981) 25, 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1979

MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF PETITIONER

Petitioner Meritor Savings Bank, FSB ("Bank"), submits this brief for reversal of the judgment filed January 25, 1985, of the United States Court of Appeals for the District of Columbia Circuit in *Vinson v. Taylor*, No. 80-2369.[1]

OPINIONS BELOW

The opinion and order of the United States District Court for the District of Columbia filed February 26, 1980, in No. CA 78-1793 (Penn, J.), awarding judgment

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[1] "Bank" references include the Bank's corporate predecessor, Capital City Federal Savings and Loan Association.

for the Bank and respondent Sidney L. Taylor ("Taylor"), is reported at 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980) and is reproduced at App. 30a-46a.[2]

The opinion and order of the Court of Appeals filed January 25, 1985, in No. 80-2369 (Robinson, C.J., Wright, J., and Northrop, J., of the United States District Court for the District of Maryland, sitting by designation), reversing the judgment of the District Court and remanding this case, is reported at 753 F.2d 141 (D.C.Cir. 1985) and is reproduced at App. 1a-21a.

On February 21, 1985, the Bank timely filed a suggestion for rehearing en banc. The Court of Appeals' per curiam order filed May 14, 1985, denying the suggestion, and the accompanying dissent by Bork, J., joined by Scalia and Starr, JJ., are reported at 760 F.2d 1330 (D.C. Cir. 1985) and are reproduced at App. 22a-29a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

The judgment under review was entered on January 25, 1985. By Order dated April 17, 1985, in No. A-782 (October Term, 1984), this Court extended the time for filing a petition for Writ of Certiorari to and including June 24, 1985.

The petition for Writ of Certiorari was filed June 21, 1985, and was granted on October 7, 1985.

STATUTE INVOLVED

Pertinent portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1982) ("Title VII"), are reproduced at App. 47a-52a.

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[2] "App." references are to the Appendix filed June 21, 1985, with the petition for Writ of Certiorari. "J.A." refers to the Joint Appendix filed herewith.

STATEMENT OF THE CASE

This is a Title VII, sex discrimination case brought by respondent Mechelle Vinson ("Vinson"), a female, based on a claim of alleged sexual harassment by Taylor, her male supervisor. Complaint, J.A. at 3.[3] The claim was brought against Taylor and against the Bank, Vinson's and Taylor's employer, for injunctive relief, compensatory and punitive damages, backpay, costs, and attorney's fees. Complaint, J.A. at 5-6.

Both Taylor and the Bank denied that any harassment had occurred. Taylor Answer, J.A. at 7; Bank Answer, J.A. at 9. The Bank also denied liability on the ground that if any harassment occurred, it occurred without the Bank's knowledge and outside the scope of Taylor's employment. Bank Answer, J.A. at 11-12.

Shortly before trial, Vinson sought leave to amend her complaint to allege certain supplemental matters and to append non-federal causes of action. The District Court's denial of leave to amend was undisturbed on appeal. 753 F.2d at 143 n.12 (App. at 3a n.12).

After an eleven-day bench trial the District Court, on February 26, 1980, denied all relief. (App. at 46a.) On January 25, 1985, the Court of Appeals reversed and remanded (App. at 21a), and on May 14, 1985, the Court of Appeals denied the Bank's suggestion for rehearing en banc, Bork, J., joined by Scalia and Starr, JJ., dissenting (App. at 22a). This Court granted the Bank's petition for Writ of Certiorari on October 7, 1985.

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[3] The suit as originally filed alleged jurisdiction under 42 U.S.C. § 1985(2) and the Fifth Amendment as well as Title VII. Complaint (J.A. at 3). Vinson abandoned any § 1985(2) and Fifth Amendment claims on appeal. 753 F.2d at 143 n.12 (App. at 3a n.12).

The trial evidence and findings may be summarized as follows.[4]

Vinson was employed by the Bank from 1974 to 1978. (App. at 31a.) Throughout that period she worked at a branch office of the Bank under Taylor's supervision. At all pertinent times, Taylor was manager of the branch and an assistant vice president of the bank. Taylor had no authority to hire, fire, or promote at the branch, although his personnel recommendations were considered by higher Bank officials. (App. at 30a, 40a; Tr. Jan. 23, 1980, at 36; Tr. Jan. 31, 1980, Pt. 2, at 8.)

At all times during Vinson's employment, the Bank had an express written policy prohibiting discrimination because of sex (J.A. at 25) and it had an established grievance procedure for employee complaints (App. at 43a). The Bank also had an Equal Employment Opportunity officer to oversee its nondiscrimination policy. (App. at 40a; J.A. at 25; Tr. Jan. 31, 1980, Pt. 2, at 29-30.)

Vinson was initially hired as a teller-trainee. After completing the customary probation period she was promoted to teller. Thereafter, she progressed to head teller and eventually assistant branch manager. (App. at 31a.) She admits, and the trial court expressly found, that those promotions were based on merit alone and that she was not required or asked to give sexual favors to obtain her promotions or any attendant benefits. (Tr. Jan. 23, 1980, at 25, 41; App. at 31a, 42a-43a.) Vinson's lawyer conceded at trial that promotions were not at issue in the case. (Tr. Jan. 31, 1980, Pt. 2, at 9.)

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[4] By Order dated May 1, 1981, the Court of Appeals permitted Vinson to proceed on appeal without obtaining a transcript of trial. The Bank thereafter obtained a partial transcript which was filed in the Court of Appeals on November 6, 1981. The partial transcript is referred to herein as "Tr."

In September 1978 Vinson took indefinite sick leave and was eventually discharged for excessive use of that leave. (App. at 43a.) While Vinson was still on sick leave and before she had been discharged, she brought this action against Taylor and the Bank. (J.A. at 3.)

At trial, Vinson testified that for the first seven or eight months of her employment, Taylor treated her in a fatherly way and made no sexual advances. However, in May 1975, according to Vinson, he invited her out to dinner and, during the course of the meal, proposed that they go to a motel to have sexual relations. At first she refused but, by the time dinner was over, she agreed. They drove to a motel and Vinson waited in Taylor's automobile while Taylor registered. They then went to a room and, after Taylor showered, they engaged in sexual relations. (App. at 31a.)

Vinson testified that the only reason she accepted Taylor's initial advance was fear of losing her job. (App. at 31a-32a.) Thereafter, according to Vinson's testimony, Taylor made repeated demands for sex and she had intercourse with him some forty or fifty times over the next several years. (App. at 32a.) According to Vinson, Taylor also fondled her in front of other employees, followed her into the women's restroom, exposed himself to her, made lewd remarks, and even forcibly raped her on several occasions at the branch premises, causing injuries requiring medical attention. (App. at 32a.) Vinson testified that these activities ceased after 1977 when she began going with a steady boyfriend. (App. at 32a.) Her employment at the Bank terminated late the following year. (App. at 31a.)

Even though Vinson herself held supervisory positions as head teller and assistant branch manager, and she presumably had responsibility for being familiar with and adhering to the Bank's nondiscrimination policy, she admitted that she never filed a grievance with the Bank, or

complained about Taylor's alleged behavior to the Bank's EEO officer or to any other Bank official. (App. at 33a, 38a; Tr. Jan. 23, 1980, at 55, 58.) She did not report the alleged rapes to the police. (Tr. Jan. 23, 1980, at 58.)

Vinson did present co-worker testimony that a senior Bank official had been told of Taylor's alleged misconduct. On cross-examination and questioning by the court, however, that testimony was impeached and the trial court found that no co-worker actually told any Bank official about alleged sexual improprieties. (App. at 37a-39a.)

Taylor denied that he had engaged in any of the alleged activity and testified that it was he who had rejected Vinson's advances. (App. at 33a.) When, because of Vinson's close working relationship with Taylor and her own behavior, a co-worker questioned whether Vinson and Taylor were having an affair, Vinson adamantly denied there was any relationship. (Tr. Jan. 30, 1980, at 8-9, 19; Tr. Jan. 31, 1980, Pt. 1, at 15.) Additional evidence was presented that Vinson had been offered routine transfers which would have involved moves away from Taylor to other Bank offices, but she turned them down. (App. at 43a; Tr. Jan. 31, 1980, Pt. 2, at 51-54.)

Taylor and the Bank also presented evidence, largely without objection, concerning Vinson's dress and personal behavior at work. For example, a female co-worker testified that Vinson wore clothes sufficiently revealing to provoke customer comments on the way she looked. (Tr. Jan. 30, 1980, at 14; Tr. Jan. 31, 1980, Pt. 1, at 30-32.) Once she had to be sent home because of inappropriate dress. (Tr. Jan. 30, 1980, at 14.) There was also defense testimony, both on direct examination and on cross-examination by Vinson's lawyer, that Vinson was "very open about her sexuality" (Tr. Jan. 31, 1980, Pt. 1, at 38, 43), and that most of her workplace conversations centered on sex. (Tr. Jan. 31, 1980, Pt. 1, at 21.) For example, she was heard giving a graphic description about a doctor's visit to remove her IUD. (Tr. Jan. 31, 1980, Pt. 1, at 12.)

She told co-workers about a recurring fantasy in which her deceased grandfather returned to life in a younger form and engaged in intercourse with Vinson for an extended period. (Tr. Jan. 30, 1980, at 23; Tr. Jan. 31, 1980, Pt. 1, at 43, 61.) She also spoke at work about her sexual association with drinking milk (Tr. Jan. 31, 1980, Pt. 1, at 11) and about the desire of another woman at the branch to have intercourse with her. (Tr. Jan. 31, 1980, Pt. 1, at 80-81.)

The Bank also called its EEO officer who identified the Bank's written equal employment and nondiscrimination policy, and who testified that he kept regular contact with branch personnel. (Tr. Jan. 31, 1980, Pt. 2, at 4, 29, 56-57.) When asked whether he had any knowledge of sexual misconduct at the branch, he stated unequivocally that the first information he received of any such improprieties was through service of the complaint in this case. (Tr. Jan. 31, 1980, Pt. 2, at 33-34.) He recounted a conversation he had had with Vinson in 1976—at a time when, according to Vinson, the harassment was actively under way—during which he informed her of a position with another department located at a different Bank office. Vinson never mentioned any problem of harassment and showed no interest in the job transfer. (Tr. Jan. 31, 1980, Pt. 2, at 51-54.)

After trial, the District Court ordered judgment for the defendants on all claims. (App. at 46a.) The District Court disbelieved Vinson's testimony that she acceded to Taylor's sexual advances out of fear for her job or that Taylor physically forced himself on her. (App. at 42a.) Among the trial court's specific findings were the following:

> 3. Plaintiff's promotions were based on merit alone; her promotions and advancements with Capital [the Bank] did not result from her rendering sexual favors to Taylor or any other member of Capital.

4. Plaintiff was not required to grant Taylor or any other member of Capital sexual favors as a condition of either her employment or in order to obtain promotion.

5. If the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with Capital, that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.

• • • •

8. Throughout her employment with the Association [the Bank], Mechelle Vinson received usual and customary increases in salary, Christmas bonuses, and promotions, on the basis of merit.

App. at 42a (footnote omitted).

With respect to Vinson's claims against the Bank, the District Court found that the Bank had a written policy against sex discrimination. It further found that despite the Bank's established grievance procedure, the Bank received no notice of any sexual harassment or discrimination from Vinson or anyone else. (App. at 42a-43a.) The District Court therefore concluded that the Bank could not be held liable, regardless of whether Vinson otherwise had a good Title VII claim. (App. at 41a.)

The Court of Appeals reversed, holding that the District Court had erred in failing to recognize that Vinson had a Title VII claim "simply for pervasive on-the-job sexual harassment" that "illegally poisoned the 'psychological and emotional work environment,'" aside from any loss or threatened loss of tangible job benefits. 753 F.2d at 144-45 (App. at 6a-8a) (quoting *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C.Cir. 1981)).

With respect to employer liability, the Court of Appeals announced an unqualified rule that "employers must answer for sexual harassment of any subordinate

by any supervising superior," 753 F.2d at 150 (App. at 18a), even though the employer neither knew nor reasonably could have known about the harassment and had no opportunity to stop it.

The Court of Appeals also questioned the District Court's finding of voluntariness. It said that if the finding meant simply that Vinson's employment status was not affected, then the District Court erred in failing to recognize that loss or threatened loss of tangible job benefits is not an essential element of a Title VII violation. 753 F.2d at 144 (App. at 8a). Alternatively, if the District Court's finding of voluntariness meant that there was no harassment, then voluntariness in that sense "had no materiality whatsoever" because "a woman employee need not prove resistance to sexual overtures in order to establish a Title VII claim of sexual harassment." 753 F.2d at 146 (App. at 8a-9a) (footnotes omitted). The Court of Appeals added that since "a woman does not waive her Title VII rights by her sartorial or whimsical proclivities, . . . testimony [about her proclivities] had no place in this litigation." 753 F.2d at 146 n.36 (App. at 9a n.36) (citing *Bundy v. Jackson*, *supra*, 641 F.2d at 944 n.25).

Following the panel decision, the Bank suggested rehearing en banc. In dissenting from denial of that suggestion, Judge Bork wrote:

> The panel's resolutions of the various issues before it, taken in combination, produce an unacceptable result. According to the panel opinion, when an employee charges sexual harassment in the workplace, the supervisor charged may not prove that the sexual behavior, far from constituting harassment, was voluntarily engaged in by the other person, nor may the supervisor show that the charging person's conduct was in fact a solicitation of sexual advances. These rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that

> sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it.

760 F.2d at 1330 (App. at 23a). Judge Bork also criticized the panel's imposition of absolute employer liability. He pointed out that even though the employer "could not have done more to avoid liability without actually monitoring or policing his employees' sexual relationships" (760 F.2d at 1331 n.3, App. at 25a n.3), and even though Taylor's alleged misconduct was "wholly unknown" to the employer and contrary to company policy, nevertheless, the employer is liable.

> The result is that the employer is virtually converted into an insurer that all relationships between supervisors and employees are entirely asexual. Though the employer has no way of preventing sexual relationships, he is defenseless and must pay if they occur and are then claimed to be harassment.

760 F.2d at 1331 (App. at 25a) (footnote omitted).

SUMMARY OF ARGUMENT

Sex *discrimination* is no less invidious than other forms of employment discrimination proscribed by Title VII. But *sex* involves considerations different from race, color, religion, or national origin. Racially or religiously derogatory workplace activity cannot reasonably be conceived as occupationally neutral or desirable. Sexual activity, on the other hand, whether between co-workers or between a supervisor and a subordinate, may well be socially acceptable and wholly unrelated to the job. An employer may fortuitously provide the occasion for romantic or sexual encounters, but he does not necessarily provide the fuel for what follows.

Questions of whether personal sexual activity has become employment discrimination, and what duties and

liabilities are to be imposed on an employer for recognizing and stopping such activity, can reasonably be answered only if the unique aspects of the activity itself are acknowledged. Rules developed for other forms of discrimination do not necessarily apply to discrimination because of sex. "If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary [Title VII] doctrines." 760 F.2d at 1333 n.7 (App. at 28a-29a n.7) (Bork, J., dissenting from denial of rehearing en banc).

Vinson's claim, as shaped by trial and appeal, is that sexual harassment and a sexually offensive psychological environment constitute an unlawful condition of employment under Title VII, § 703(a)(1).[5] She seeks to hold the employer liable for the unlawful condition even though she never complained to the employer, the employer did not otherwise learn about any harassment, and the employer had an established policy against sex discrimination. And she objects on relevancy grounds to defensive evidence of her own voluntary workplace sexual conduct and her sexual fantasies as she described them to co-workers.

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[5] "Sexual harassment," as used by the Court of Appeals in this case, means "'[u]nwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature . . . ha[ving] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.'" 753 F.2d at 146 (App. at 9a) (quoting Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1984)).

The lower courts have sometimes classified sex discrimination claims as *"quid pro quo"* cases, involving job-related promises or threats in exchange for sexual favors, and "harassment" or "environment" cases, where no economic or other tangible benefit is at stake. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982). According to that classification scheme, the case at bar would fall in the latter category.

In denying relief to Vinson, the District Court applied liability and evidentiary rules well grounded in statute and good sense. It held that an employer without knowledge of or opportunity to stop alleged sex discrimination of this type should not, in the face of an established policy against sex discrimination, be liable for a supervisor's misconduct. The District Court also relied on evidence of Vinson's voluntary participation in the alleged sexual relationship she described and evidence of her sexually-oriented conduct at work, in holding that Vinson was not a victim of sex discrimination.

In reversing, the Court of Appeals imposed absolute liability on the Bank for Taylor's alleged misconduct, even though such misconduct was contrary to Bank policy, could not have been intended to promote the Bank's interests, and was unknown to any Bank official except the alleged perpetrator himself. That holding is inconsistent with the statute and contrary to the decisions of most other circuit courts.

Title VII, § 706(g), provides that judicial relief may not be granted for unlawful treatment under § 703(a)(1) unless the employer intentionally discriminated. If the psychological environment is to be considered a condition of employment, and if a sexually offensive psychological environment is to be considered a discriminatory condition, then the employer cannot fairly be said to have intentionally discriminated unless he knew about the condition and failed to remedy it.

In the case of a corporate employer, which acts only through its officers and employees, the employer can fairly be charged with knowledge of the condition only if one of its officers or employees with corporate authority to initiate corrective action is on notice of the condition. Notice to the actual perpetrator—regardless of his corporate position and authority—cannot fairly be imputed

to the employer because the perpetrator is motivated to keep his knowledge secret, not to disclose it and invite discipline for his indiscretions. Any rule of employer liability that fails to respect these general principles is not faithful to the statute.

Applying the foregoing principles to the facts of this case, it is clear that the Bank did not intend to discriminate and cannot be held responsible for Taylor's alleged misconduct.

In 1980, the Equal Employment Opportunity Commission ("EEOC") amended its Guidelines on Discrimination Because of Sex ("Guidelines")[6] to address the question of employer liability for sexual harassment. However, the Guidelines do not mention intent in this context, and they are ambiguous and inconsistent with respect to the liability standards they posit. The Guidelines purport to impose absolute liability where supervisory misconduct is involved, without regard to whether the particular acts were authorized by or known to the employer. At the same time, the Guidelines call for a case-by-case determination of whether the supervisor acted outside the scope of his supervisory capacity, and they abandon an absolute liability standard for harassment by non-supervisory employees. While the Guidelines could arguably be reconciled with the statutory interpretation urged here, judicial attention is more profitably directed to the statute itself.

Although no party asked it to do so in this case, the Court of Appeals took the opportunity to issue new rules of evidence for harassment claims. The rules it issued do not suit the contours of the violation shaped earlier in *Bundy v. Jackson, supra.* Instead, the rules effectively

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[6] The Guidelines are currently codified at 29 C.F.R. Part 1604.11 (1984).

redefine harassment to eliminate welcomeness as an issue, and to make a sexually charged environment unlawful whether or not the complainant was offended by the environment or even helped to create it.

The threshold question of whether sexual harassment even states a claim under Title VII has never been considered by this Court. A fair reading of Title VII itself, a review of the history and circumstances of the statute's enactment, consideration of this Court's decisions interpreting Title VII generally and sex discrimination in particular, and due regard for the allocation of judicial business between the federal and state systems, all compel the conclusion that harassment which is unrelated to any loss or threatened loss of tangible job benefits cannot give rise to a Title VII claim.

Congressional intent as shown by the language and history of Title VII was to remedy economic and other tangible detriment suffered as a result of job-related discrimination. Congress was not enacting environmental legislation, nor was it creating a new federal tort of harassment. Debate over the House floor amendment adding "sex" to the list of prohibited criteria focused on obtaining and maintaining jobs by merit, not on being free from offensive, antisocial behavior. Decisions of this Court, dealing with race, sex, and other forms of discrimination, similarly address the economics of discrimination; none of those decisions suggests that psychological environment was within the ambit of Congressional concern.

However distasteful sexual harassment may be, competing considerations—most particularly, faithfulness to Congressional intent—counsel against such a far-reaching judicial expansion of Title VII.

ARGUMENT

I. CONGRESS DID NOT INTEND TO MAKE INNOCENT EMPLOYERS ABSOLUTELY LIABLE FOR TITLE VII SEX DISCRIMINATION.

A. Employer Liability Under Title VII For Discriminatory Treatment Because Of Sex Requires Proof Of Intent.

It is an unlawful employment practice under Title VII, § 703(a), for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Section 706(g) of the statute authorizes judicial relief if the unlawful employment practice is found to be intentional. The section provides:

> If the [district] court finds that the respondent [to the unlawful employment practice charge] has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . .

(Emphasis added.)

Intent is a critical element of the statute. In response to legislators' fears that Title VII would penalize an innocent employer (*e.g.*, 110 Cong. Rec. 8177 (Apr. 16, 1964)), Congress amended the pending civil rights bill, H.R. 7152, 88th Cong., 1st Sess. (1963), to make clear that only intentional conduct would result in Title VII liability. Senator Humphrey described this change in § 706(g) of the bill as follows:

> Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or natural [sic] origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders. *It means simply that the respondent must have intended to discriminate.*

110 Cong. Rec. 12723-24 (June 4, 1964) (emphasis added).

Consistent with the statute, this Court has repeatedly ruled that "[p]roof of discriminatory motive is critical" in disparate treatment cases under § 703(a)(1). *E.g., International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).[7] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court confirmed that intent was a requisite element of a § 703(a)(1) claim, and it remanded the case to afford the plaintiff an opportunity to prove that the employer's stated reason for refusing to hire the plaintiff was in fact a pretext for racial discrimination. *Id.* at 805. Similarly, in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), another racial discrimination case, the absence of any showing of discriminatory intent required reversal of the court of appeals' order that the employer alter certain hiring practices. *Id.* at 579. And in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), this Court

[7] In disparate impact cases under § 703(a)(2), no showing of intent to "discriminate" is required, *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), since § 703(a)(2) does not deal with discrimination per se but with limiting, segregating and classifying employees. According to the statute, an intent to "limit, segregate, or classify" would have to be shown in order to grant relief for a violation of § 703(a)(2).

reversed an appellate court holding that the employer had the burden of proving absence of discriminatory motive.

More recently, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a sex discrimination case, this Court rejected an attempt by the circuit court to shift the burden of proving motive from the plaintiff to the employer, holding that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated . . . remains at all times with the plaintiff." *Id.* at 253. *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), which reaffirmed the intent requirement but recognized that intent may be proved by circumstantial evidence; *Anderson v. City of Bessemer City*, —— U.S. ——, ——, 105 S.Ct. 1504, 1511 (1985) (finding of intent may be overturned on appeal only if clearly erroneous, based on evidence as a whole).

In defining "employer" generally as a person engaged in an industry affecting commerce who has fifteen or more employees and any agent of such a person (Title VII, § 701(b)), Congress necessarily recognized that most persons subject to Title VII would be companies whose contracts are made and whose business is conducted through officers and employees. Congress therefore must have recognized that, for the most part, the intent requirement of § 706(g) would be met through imputation. While Congress did not specify the precise rules for imputing intent, any rule that *automatically* imputes discriminatory intent to corporate employers effectively reads intent out of the statute. Some rule short of automatic imputation is needed to give proper effect to the statute.

The Bank urges, and most circuit court decisions dealing with sexual harassment have concluded, that the employer must be placed on notice of the harassment and have an opportunity to cure it before responsibility can be imposed. In *Henson v. City of Dundee*, 682 F.2d 897,

905 (11th Cir. 1982), involving allegations of sexual harassment by a supervisor, the Eleventh Circuit said:

> Where, as here, the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.

(Citations and footnote omitted.)

In *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983), the court held that the plaintiff in a sex harassment case "must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation." Similarly, in *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80 (3d Cir. 1983), the court of appeals, in holding the corporate employer liable for a supervisor's harassment and subsequent discharge of the plaintiff, pointed out that the corporate president "had actual notice of the harassment immediately after the discharge and failed to take adequate remedial steps." *See Barrett v. Omaha Nat. Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (prompt investigation and remedial action following complaint of sexual harassment negates employer liability).

Earlier sex discrimination cases in the District of Columbia Circuit also recognized the appropriateness of a notice and opportunity to cure requirement. In *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir. 1977), the court said:

> We realize that should a supervisor contravene employer policy without the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved from responsibility under Title VII.

Id. at 993 (footnote omitted). In *Bundy v. Jackson*, *supra*, the District of Columbia Circuit distinguished *Barnes* only because the employer in *Bundy* had full notice of the sexual harassment and did virtually nothing to stop it or investigate it. *Bundy v. Jackson*, *supra*, 641 F.2d at 943.[8]

Similar rules have been invoked with respect to analogous civil rights and labor legislation. For example, in *General Bldg. Contr. Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), involving the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982), even in the absence of an express intent provision this Court held that employers are not guarantors of workers' rights as against third parties and that only purposeful, intentional discrimination would subject an employer to liability. In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977), the Court held that Fourteenth Amendment Equal Protection claims require a showing of discriminatory purpose. And in *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 520-21 (1941), the Court held the employer liable under the National Labor Relations Act, now codified as amended at 29 U.S.C. §§ 151-167 (1982), for unauthorized antiunion conduct of supervisory personnel only because, when the employer learned of the conduct, it failed to take sufficient corrective action.

The statute also determines to whom notice must go. Section 703(a) prohibits the employer from discriminating with respect to "conditions" of employment because of sex. If the psychological environment is held to be a condition of employment and if sexual harassment is held to be discrimination because of sex, then a corporate officer or employee who has corporate authority to initiate

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[8] *Cf. Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985), purporting to follow a rule of absolute liability. The opinion indicates, however, that the harassment victim did complain to higher authority but no effective action was taken. *Id.* at 602.

corrective action to change the environment and stop the harassment must be on notice. Otherwise, corporate inaction would not be a manifestation of an intent to discriminate.

An important corollary of the notice and opportunity to cure requirement is that notice to the perpetrator himself, regardless of the perpetrator's corporate status or authority, cannot be notice to the employer.[9] As the District Court below aptly observed: "[I]t seems reasonable that an employer should not be liable in these unusual cases of sexual harassment where notice to the employer must depend upon the actual perpetrator . . . ." (App. at 40a-41a.) The reason is plain: in such cases the perpetrator—be he a co-worker, a supervisor, or a company officer—is acting for "his reason and by his own means." *Henson v. City of Dundee, supra*, 682 F.2d at 910. He is motivated to keep his conduct secret, not to report it and invite discipline. Nor can the victim of a supervisor's harassment reasonably believe that the perpetrator is disclosing his own misconduct and that the employer's failure to correct the problem reflects an intent to discriminate.

The corollary that notice to the perpetrator cannot be notice to the employer finds analogues throughout the law. For example, in agency law, notice to an agent is not notice to his principal where the agent's own interest is adverse to his principal or where the subject matter of the notice has no connection with the agent's duties. Restatement (Second) of Agency § 268 and comment *c* (1958). In order to impose punitive damages on an em-

[9] Only where the perpetrator is fully the alter ego of the company might knowledge of the perpetrator be chargeable to the company. *See, e.g., Clark v. World Airways, Inc.*, 24 Fair. Empl. Prac. Cas. (BNA) 305, 310 (D.D.C. 1980), where the perpetrator held the three highest corporate offices and was also an 80% stockholder and a director. No such alter ego relationship could possibly be claimed here.

ployer for the intentional tort of its employee, the employer must be shown to have participated in the tort, authorized it, or ratified it. Restatement (Second) of Torts § 909 (1979). For crimes requiring specific intent, a corporate employer is not liable for the acts of its manager if the manager acted disobediently and not for the purpose of serving the employer. Restatement (Second) of Agency § 217D, comment *d* (1958).

Just as the principal cannot be charged with knowledge of matters known only to his faithless agent, so here, the employer should not be held liable for unreported sexual conduct of its supervisory employee.

B. The Bank Did Not Intend To Discriminate.

In *Henson*, the plaintiff complained to the city manager about harassment by the chief of police. In *Katz*, she made a series of complaints, each time to a higher authority. In *Craig*, she complained to the company president. In *Barrett*, she complained to the vice president in charge of banking services. In *Barnes*, she pursued an internal grievance against her federal employer all the way to the Civil Service Commission. In *Bundy*, she complained to the director of the agency where she was employed. But here, Vinson complained to no one.

Not that Vinson lacked opportunity to complain. She herself held supervisory positions and had contact with Bank officials above Taylor. At one point during the height of the alleged harassment she even had a conversation with the Bank's EEO officer on an unrelated matter. He told her about an opening at another Bank office, which she turned down without mentioning harassment.

The existence of a grievance procedure and the fact that the Bank's EEO officer had regular contact with branch personnel preclude argument that the Bank sought to keep itself ignorant of any discrimination. All the evidence points not to an intent to discriminate but to an intent to prevent discrimination.

In the words of the Guidelines, "Prevention is the best tool for the elimination of sexual harassment." Guidelines, 29 C.F.R. § 1604.11(f). Here the Bank took every reasonable preventive step. The Court of Appeals' opinion below would require an employer to go even further and prohibit all personal relationships between employees. But policing personal relationships may itself give rise to liability. In Oregon, for example, a rule against coworker dating is so "outrageous" and "beyond the limits of social toleration" that an employer who enforces such a rule may be sued for causing emotional distress. *Patton v. J. C. Penney Co.*, 215 Daily Lab.Rep. (BNA) (A-1, A-2 (Ore.App. 1985).

Encouraging voluntary settlements of employment discrimination claims is a fundamental Title VII policy. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Notice of a claim is central to any settlement process. A decision for Vinson in this case would frustrate that policy.

C. EEOC Guidelines On Employer Liability For Title VII Sex Discrimination Offer No Guidance To Interpreting The Statute.

The EEOC, created by Title VII in 1964, does not have authority to make substantive rules and regulations. Title VII, § 713(a). Its interpretations of Title VII therefore lack the force of law and are owed judicial deference only to the extent they are persuasive. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-31 (1975); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976), *reh'g denied*, 429 U.S. 1079 (1977). *Gilbert*, relying on *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), lists the considerations by which the persuasiveness of the Guidelines is to be judged. As in *Gilbert*, the particular Guidelines involved here do not fare well.

Guidelines relating to sex discrimination were first issued by the EEOC in late 1965. 30 Fed. Reg. 14926 (1965). The 1965 version did not mention sexual harassment and, accordingly, did not indicate by what standard employer liability for such conduct should be determined. A series of subsequent amendments similarly failed to address those matters. *See* 33 Fed. Reg. 3344 (1968); 37 Fed. Reg. 6836 (1972); 44 Fed. Reg. 23804 (1979).

The first Guidelines to consider harassment were issued on an iterim basis in April 1980. 45 Fed. Reg. 25024 (1980). Final Guidelines virtually identical to the interim provisions were issued later the same year. 45 Fed. Reg. 74676 (1980). The 1980 Guidelines interpret Title VII as prohibiting sexual harassment, defined as unwelcomed sexual advances or other conduct of a sexual nature which, *inter alia*, creates an intimidating, hostile, or offensive working environment. The Guidelines state that the employer is responsible for harassment by a *supervisor*, regardless of whether the specific acts complained of were authorized or even forbidden and regardless of whether the employer knew or should have known of their occurrence. The Guidelines further require examination of the circumstances of the particular employment relationship and job functions in order to determine whether the supervisor acted in his supervisory capacity. With respect to acts of *co-workers* and *non-employees*, the Guidelines interpret Title VII as imposing liability on the employer if the employer knew or should have known about the misconduct but failed to take immediate and appropriate corrective action. The Guidelines do not mention intent. Guidelines, 29 C.F.R. § 1604.11(c), (d), and (e) (App. at 54a).

Measured against the standards reiterated in *General Elec. Co. v. Gilbert, supra*, the Guidelines' rules for employer liability merit no judicial deference. They are neither a contemporaneous nor a long-standing interpretation of Title VII, having been issued some sixteen years after passage of Title VII. (In *Gilbert*, the EEOC's

pregnancy discrimination guidelines failed the contemporaneousness test based on an eight-year gap.)

To the extent the Guidelines propose a rule of absolute employer liability for a supervisor's harassment, they are not faithful to the statute. At a minimum, one would expect the Guidelines to explain how, in the EEOC's view, the intent requirement is met where a corporate employer is charged with discrimination based on a supervisor's harassment. However, the Guidelines are silent on that topic.

The Guidelines also appear to be internally inconsistent. On the one hand, they purport to impose absolute liability on the employer for a supervisor's acts regardless of whether the acts were authorized or even forbidden, and regardless of whether the employer knew or should have known of their occurrence. Guidelines, 29 C.F.R. § 1604.11(c) (App. at 54a). The Court of Appeals attached "considerable weight" to that provision of the Guidelines in its ruling below. 753 F.2d at 149 (App. at 15a). But in seeming contradiction to the rule of absolute liability for supervisory acts, the Guidelines then go on to counsel examination of the circumstances of the particular employment relationship and job functions in order to determine whether the supervisor acted within his supervisory capacity. Moreover, the Guidelines abandon any absolute liability rule and require a showing of notice in the case of harassment by co-workers and others. Yet if the employer is absolutely liable for an offensive workplace environment regardless of notice or opportunity to cure, it should not make a difference who created the offensive environment.

The EEOC itself has taken inconsistent positions on the employer liability question. Prior to issuance of its Guidelines, the EEOC appears to have followed a rule requiring notice and opportunity to cure before an employer would be held liable for supervisory acts. *See EEOC Decs. No. 70-432*, EEOC Decisions (CCH) ¶ 6130 (1970):

> . . . [W]hile it is well established that Respondent [employer] is accountable for the actions of its supervisory personnel, in light of the undisputed fact that Respondent promptly undertook measures calculated to remedy the arguably discriminatory condition, the Commission will not impute the Supervisor's unauthorized conduct to his employer.

See also EEOC Decs. No. 72-0779, EEOC Decisions (CCH) ¶ 6321 (1973) (employer liable for acts of supervisor where no prompt remedial action taken). Even after issuance of the Guidelines, the then Acting Chairman of the EEOC wrote in 1981 that the Guidelines "follow the well established common law standard of *respondeat superior*," a tort law concept more restrictive than absolute liability. J. Smith, "Prologue to the EEOC Guidelines on Sexual Harassment," 10 Cap. U.L. Rev. 471, 474 (1981). In 1982, Commissioner and Vice Chair Cathie Shattuck expressed concern regarding the Guidelines' strict liability standard for sexual harassment. 110 Lab. Rel. Rep. (BNA) 270-71 (1982) (News and Background Information). A current commissioner would construe the Guidelines as not mandating a rule of strict liability in a "work environment" case not involving any "*quid pro quo*" elements. R. Silberman, "EEOC Memorandum on PSFS Savings Bank, FSB v. Vinson," *reprinted in* 210 Daily Lab.Rep. (BNA) E-1 (Oct. 30, 1985).[10]

Commissioner Silberman's construction of the Guidelines may be possible and would certainly make more sense. However, it must be kept in mind that this case involves the interpretation of a statute, not an agency rule, and that courts, not agencies, are the experts in matters of statutory interpretation. *See* 1 Davis, Administrative Law Treatise, § 5.05 at 315-16 (1958). If, as shown above, the Guidelines are not helpful to an under-

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[10] *But see* "J. Butler, "Memorandum of EEOC General Counsel," *reprinted in* 210 Daily Lab.Rep. (BNA) E-2 (Oct. 30, 1985).

standing of Congressional intent, then there is simply no reason to struggle with them. The interpretive process should be applied directly to the statute itself, not to a belated, internally inconsistent, and ambiguous administrative reading of the statute.

II. EVIDENCE OF VOLUNTARY SEXUAL CONDUCT AND WORKPLACE DRESS, SEXUAL FANTASIES AND PROCLIVITIES WAS PROPERLY ADMITTED AS PROOF THAT VINSON WAS NOT A VICTIM OF SEX DISCRIMINATION.

The Court of Appeals recognized the need in Title VII cases to "filter out personal relationships that are not products of employment-related intimidation . . . [since t]he touchstone . . . [of an harassment claim] is that sexual advances must be unwelcome . . . ." 753 F.2d at 150 n.68 (App. at 17a n.68). Nevertheless, it ruled improper the very evidence that was used to show the personal nature of the alleged relationship and the welcomeness of the alleged advances.

As a threshold matter, the particular evidence question was not properly before the Court of Appeals because Vinson did not raise the point in her briefs to that court. *See, generally*, Brief for Mechelle Vinson filed below on August 26, 1981; Reply Brief of Mechelle Vinson filed below on December 31, 1981. Moreover, insofar as the partial trial transcript discloses, most of the evidence was received in the District Court without objection by Vinson's lawyer. It was thus inappropriate, on procedural grounds alone, for the Court of Appeals to address the particular evidence question.

The evidentiary rulings are equally inexplicable on substantive grounds. The Court of Appeals appears to have taken the view that, like racial epithets, sexual advances are inherently evil and entitled to a conclusive presumption of unwelcomeness. As Judge Bork put it, "[T]o be charged is to be guilty." 760 F.2d 1331 (App. at 25a).[11]

But sex is simply not equivalent to race or other Title VII classifications:

> Sexual advances may not be intrinsically offensive, and no policy can be derived from the equal employment opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorization cards, which serve no one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.

Barnes v. Costle, supra, 561 F.2d at 1001 (MacKinnon, J., concurring). *See* Guidelines, 29 C.F.R. § 1604.11(b) (App. at 54a) ("In determining whether alleged conduct constitutes sexual harassment, the Commission will look at . . . the nature of the sexual advances and the context in which the alleged incidents occurred"). *See also* J. Smith, "Prologue to the EEOC Guidelines on Sexual Harassment," 10 Cap. U.L. Rev. 471, 473 (1981), where the then acting chairman of the EEOC discussed the difficulty faced by the EEOC in attempting to frame guidelines to distinguish between offensive and acceptable sexual behavior.

Once it is recognized that a personal relationship between a supervisor and a subordinate can be non-actionable, then ordinary rules of evidence should apply in determining whether the subordinate welcomed or was offended by the invitations for sex. Applying those rules,

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[11] Although this case does not involve any *quid pro quo* discrimination, the Court of Appeals' opinion seems to be based on an unspoken assumption that all relationships between a supervisor and a subordinate are always, to some extent, coercive. The Court of Appeals' evidentiary rulings effectively convert that unspoken assumption into a substantive Title VII doctrine.

it is clear that the questioned testimony was properly admitted and considered at trial. For example, evidence of sexual fantasies involving Vinson's deceased grandfather was probative of whether the charges were fantasized here. *See* Fed.R.Evid. 607, 608(b). The fact that she freely *told* fellow employees about the fantasies proves that she helped create and was not offended by the very environment she now claims to be actionable. And the fact that, by her own testimony, Vinson acceded to at least some of Taylor's alleged invitations is evidence that the invitations may have been solicited or welcomed. *Cf.* Fed.R.Evid. 412(b), permitting evidence in a rape case of prior sexual acts between the accused and the complainant on the issue of consent to the incident in question.

Case law illustrates the proper role for such evidence. In *Gan v. Kepro Circuit Systems, Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D.Mo. 1982), the court dismissed a Title VII claim because the

> allegedly harassing conduct was substantially welcomed and encouraged by plaintiff. She actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct.

In *Evans v. National Post Office Mail Handlers Union*, 32 Fair Empl. Prac. Cas. (BNA) 634, 635 (D.D.C. 1983), the court, having found that the workplace was "pervaded with sexual activity and sexual innuendo," nevertheless dismissed a claim for sexual harassment. The *Evans* court observed that the complainant and others often discussed and revealed to their supervisors intimate details about their personal lives, including sexual activities, and that the complainant's sexual relationship with her supervisor was entirely personal and otherwise welcomed and encouraged. And in *EEOC Decs. No. 84-1*, EEOC Decisions (CCH) ¶ 6839 (1983), one of the complainants conceded that, at least during the first two months of employment, she "went along with" sexual conduct in the

office. She further admitted using "dirty remarks" and telling "dirty jokes," in order to "fit into the new workplace" and to "get along with" her boss and co-workers. On those facts, the EEOC rejected her claim:

> It is the Commission's position that participating in sexual conduct in the workplace indicates that the activity is not unwelcome and that, having participated, simply ceasing to participate is insufficient to show that the continuing activity is unwelcome. Where a charging party at one time participated in activity of a sexual nature, the Commission will find that the activity was not unwelcome to the charging party during the period of participation and that it did not become unwelcome thereafter unless the charging party clearly indicated to the alleged harasser that the sexual conduct was unwelcome. A charging party in such circumstances has an affirmative duty to so notify the alleged harasser.

(*Id.*, footnote omitted.)

Voluntariness is a critical issue in the defense of a claim based on unwelcomed sexual advances. Here, the Court of Appeals distrusted the District Court's finding of voluntariness, apparently because the finding was made before *Bundy v. Jackson, supra*, had been decided. *See* 753 F.2d at 145-46 (App. at 8a-9a), where the court indicated that the finding of voluntariness was ambiguous: the finding could have meant that Vinson's acquiescence in alleged sexual advances was entirely consensual in that no physical force or job-related, economic coercion was used; or it could have meant merely that Vinson's acquiescence was obtained without physical force, leaving open the possibility of economic coercion.

By searching for an ambiguity in the District Court's finding, the Court of Appeals failed to give proper deference to the record as a whole. *See Anderson v. City of Bessemer City*, —— U.S. ——, ——, 105 S.Ct. 1504, 1511 (1985), a Title VII case in which this Court held

that the appeals court must review the evidence in its entirety when applying the "clearly erroneous" standard to the trial court's findings. When the District Court's finding of voluntariness here is coupled with its other well supported findings that Vinson's promotions were based on merit alone, that she was not required to grant sexual favors either to keep her job or to get promotions, and that any relationship she may have had with Taylor had nothing to do with employment, then the meaning becomes perfectly clear: Vinson's involvement in alleged sexual activity with Taylor was entirely consensual and free from any job-related coercion. In short, her involvement was wholly unrelated to any Title VII concern.

III. CONGRESS DID NOT INTEND TO REGULATE PURELY PSYCHOLOGICAL ASPECTS OF THE WORKPLACE ENVIRONMENT UNDER TITLE VII.

Implicit in any resolution of the liability and evidence issues discussed above is the holding that an offensive work environment created by sexual advances and other unwelcomed conduct of a sexual nature is an unlawful employment practice under Title VII. Such a holding does not, however, find support in the statute, any legislative history of the statute, or interpretive case law from this Court. Such a holding would thus represent a significant and unwarranted expansion of Title VII. For that reason alone, the Court of Appeals' judgment should be reversed.

In prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with "legal injuries of an economic character occasioned by" discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The remedial provisions of Title VII, set forth at § 706(g), similarly reflect Congressional concern for, and have an

"obvious connection" with, tangible loss. *Albemarle*, *supra*, 422 U.S. at 417. In passing Title VII, Congress was not enacting environmental legislation, nor did it intend to create a new federal tort of harassment.

This Court has repeatedly characterized Title VII in terms of tangible, economic barriers erected by discrimination. *E.g.*, *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 417-18; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a race discrimination case involving the disparate impact of an employer's testing and educational requirements, the Court characterized Title VII as follows:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.
>
> • • • •
>
> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.
>
> • • • •
>
> . . . [T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of . . . [a prohibited classification].

Id., 401 U.S. at 429-31, 434 (citing 110 Cong. Rec. 7247, footnote omitted). *See also Nashville Gas Co. v. Satty*, 434 U.S. 136, 152 n.6 (1977), where Justice Powell, concurring, said: "[E]ssential equality in *compensation* for

comparable work is at the heart of" Title VII (emphasis in original); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (Title VII seeks to assure "fair and . . . neutral employment and personnel decisions").

Legislative history relating specifically to inclusion of "sex" as a prohibited classification indicates that concern over sex discrimination was similarly focused on tangible, economic benefits, not environmental or tort law matters. The term "sex" was added to Title VII by House floor amendment to H.R. 7152, 88th Cong., 1st Sess. (1963). In offering the amendment, Representative Smith said:

> I think we all recognize and it is indisputable fact that all throughout industry *women are discriminated against in that* just generally speaking *they do not get as high compensation for their work as do the majority sex.* Now, if that is true, I hope that the committee chairman will accept this amendment.

110 Cong. Rec. 2577 (Feb. 8, 1964) (emphasis added).

Speaking in support of the amendment, Representative Bass offered the example of an airline stewardess who, upon her forthcoming marriage, would lose her job because of discrimination against married women. *Id.* at 2578.[12] Representative Griffiths mentioned that should the bill not be thus amended, "white women will be last at the hiring gate." *Id.*

Subsequent debate on the amendment dealt with the relative effect of the bill on blacks, women, and other minority groups. Again, the effect was discussed in terms

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[12] The concern was not unfounded. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), *reh'g denied*, 456 U.S. 940 (1982), involving TWA's policy of grounding female, but not male flight attendants who become parents.

of "hiring, firing, promotion, or in matters of seniority." *Id.* at 2579. As Representative Celler put it: "We are addressing ourselves to business activity." *Id.*

Senate floor debate on H.R. 7152, though not dealing solely with sex discrimination, echoes the House debate in focusing on equality of opportunity with respect to tangible, economic benefits. *See* Clark/Case Memorandum describing employment discrimination as depriving persons of employment opportunities or otherwise affecting their employment status. 110 Cong. Rec. 7212 (Apr. 8, 1964).

In amending Title VII in 1972 to strengthen EEOC's enforcement powers and make Title VII applicable to state and local governments, Congress again focused its concern on tangible effects of job discrimination. *E.g.*, H.R. Rep. No. 238, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2140, where the House Education and Labor Committee, in reporting H.R. 1746, 92d Cong., 1st Sess. (1972), illustrated the need for the bill by, *inter alia*, pointing out the continuing disparity in men's and women's incomes and criticizing the practice of gender-based, stereotypical job placements.

This Court has interpreted Title VII's prohibition of sex discrimination consistent with the foregoing legislative history. In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), involving a Title VII claim against an employer who refused to hire women with pre-school age children, the Court stated that § 703(a) "requires that persons of like qualifications be given employment opportunities irrespective of their sex." More recently, in *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Court held Title VII violated by a city department requirement that female employees contribute greater amounts to a department-operated pension plan than male employees, even though it could be shown that women as a class outlive men and that

pension benefits for them are more expensive. In *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), the Court invoked the *Manhart* holding to strike down the benefit structure of an employee retirement plan underwritten by employer-selected, private insurers. And in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the Court held cognizable under Title VII a claim by a female attorney against the law firm that employed her that in not offering her a partnership the firm discriminated on the basis of sex.

The view that Title VII should be so broadly construed as to encompass purely psychological aspects of the workplace environment is often credited to *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In *Rogers*, the only issue before the court was the "preliminary and undefinitive" question of whether the scope of an EEOC investigation of a pending complaint should be limited or whether, instead, the EEOC should be allowed to pursue threshold discovery. *Id.*, 454 F.2d at 236. The complaint, brought by a Spanish-surnamed employee of an optometry office, was at best cryptic as to the type of discrimination being alleged. It said in pertinent part only: "The above company has discriminated against me because of my national origin Spanish surnamed American by . . . segregating the patients." *Id.*

The judgment of the *Rogers* court was against limiting the EEOC's investigation at such an early stage. In announcing that judgment, Judge Goldberg wrote that, in his view, Title VII is a "broad-gauged . . . charter of principles . . . [under which] employees' psychological as well as economic fringes are statutorily entitled to protection . . . ." *Id.*, 454 F.2d at 238. That view, however, represented no more than a personalized philosophy of Title VII, since neither of the other two appeal panel members joined in the opinion. Judge Godbold specially concurred in the result only and wrote a separate opinion rejecting any construction of the complaint as alleging an

environment-type violation. *Id.*, 454 F.2d at 241-42. Judge Roney dissented, stating that if the words "segregating the patients" were construed as asserting a claim based on "the relationship between an employee and his working environment," then such a claim would not be within the Congressionally intended scope of Title VII. *Id.*, 454 F.2d at 245.

In *Bundy v. Jackson*, 641 F.2d 934 (D.C.Cir. 1981), the District of Columbia Circuit relied uncritically on Judge Goldberg's opinion in *Rogers*. Characterizing that opinion as an enunciation of Title VII principle, and not mentioning the special concurrence and dissent, the *Bundy* court concluded that sexual harassment, without more, amounts to discrimination under Title VII. *Bundy*, together with the Guidelines which themselves rely on *Rogers*, provides the principal justification for the Court of Appeals' holding in this case.[12]

According to the Court of Appeals' opinion below, if loss or threatened loss of tangible job benefits were held a necessary element of a Title VII sex discrimination claim, then harassment victims would face a "hideous quadrilemma": to acquiesce in the harassment and lose all hope of Title VII redress; to yield to the sexual advances with similar loss of redress; to oppose the advances; or to resign. 753 F.2d at 146 (App. at 24a).

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[12] Although no circuit level decision since *Bundy* has expressly rejected an environmental theory of sex discrimination, *quid pro quo* aspects of some of the cases serve to distinguish the precise holdings. *See Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983); *Barrett v. Omaha Nat. Bank*, 726 F.2d 424 (8th Cir. 1984); *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985); *Downes v. FAA*, 775 F.2d 288 (Fed. Cir. 1985). Pre-*Bundy* decisions in the First and Ninth Circuits address *quid pro quo* discrimination without expressly discussing an environment theory. *Fisher v. Flynn*, 598 F.2d 663 (1st Cir. 1979); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). The Second, Fifth, Sixth, and Tenth Circuits do not appear to have considered the question.

Yet if the alleged harassment is not of a character or scope sufficient to provoke at least some objection or interfere at least to some measurable degree with a complainant's job, the harassment should not occasion Title VII concerns.

Given the range of relief available for Title VII grievances—including injunctions, reinstatement, back-pay, promotions, and attorneys' fees—a victim of harassment does not materially increase her risk by refusing the advances or by complaining to her employer. If on doing so the advances cease and the atmosphere is cleared, all without reprisal, then there is no necessity to invoke EEOC administrative machinery and federal judicial process. But if the harassment continues and interferes with job performance, or if reprisal follows, appropriate job-related remedies are at hand. Reprisal for the exercise of Title VII rights is itself a violation of Title VII, § 704(a).

A refusal to expand Title VII to cover sexual misconduct not involving any job-related detriment does not leave potential plaintiffs without appropriate civil recourse. For example, if a claimant could show threatened or actual physical contact to which she had not consented —a showing not made in this case—a state cause of action for assault or battery could be pursued. Sexual harassment might also support other non-federal actions, such as intentional infliction of emotional distress. *See, e.g., Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981) (in federal diversity action, plaintiff's complaint for intentional infliction of emotional distress grounded on sexual harassment states good claim under District of Columbia law). *Cf. Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977) (harassment by co-workers on account of plaintiff's speech impediment actionable if resultant emotional distress is severe). *See* Title VII, § 708, saving consistent state law from pre-

emption by Title VII. Vinson herself attempted to append state law claims to her complaint, but the proffered amendment came too late. 753 F.2d at 143 n.12 (App. at 3a n.12).

The clear focus of Title VII on economic and other tangible job detriment warrants a rule rejecting sexual harassment, without more, as a Title VII unlawful employment practice. Requiring actual or threatened loss of tangible benefits as an element of a Title VII harassment claim sensibly distinguishes employment decisions from personal predelictions. It also separates coerced sex from voluntary sex. And it leaves for state courts the opportunity to fashion appropriate tort rules and damage remedies.

CONCLUSION

Sexual activity is special because it is generally secretive and, in many circumstances, it is welcomed, desirable, and proper. If by enacting Title VII Congress meant to regulate sexual activity, then reason requires that Title VII be applied in light of the special nature of the activity. Applying the intent requirement of § 706(g), an employer should not be held liable for a supervisor's misconduct unless someone with authority to initiate corrective action, other than the supervisor himself, knew of the conduct but did nothing to stop it. Applying the provision of § 703(a)(1) making it unlawful to discriminate *against* an individual, evidence showing that the complainant welcomed, directly or indirectly invited, or voluntarily participated in the conduct should be admissible in defense of a Title VII claim.

Underlying these issues is the fundamental question of whether sexual harassment is cognizable at all under Title VII. Again, the special nature of sexual activity, coupled with the language, history, and prior judicial interpretations of Title VII, warrants rejection of such a claim.

For each of the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

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RESPONDENT'S

BRIEF

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No. 84-1979

In The
Supreme Court of the United States
October Term, 1985

MERITOR SAVINGS BANK, FSB,
Petitioner,
v.
MECHELLE VINSON, *et al.*,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the District of Columbia

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QUESTIONS PRESENTED

1. Whether the writ of certiorari was improvidently granted on this incomplete and ambiguous factual record.

2. Whether sexual harassment as a condition of work, because it is sexual, is less discriminatory than other forms of employment discrimination.

3. Whether employers are liable for sexual harassment by supervisors which creates a discriminatory working environment.

4. Whether evidence of plaintiff's dress and reported fantasies is admissible in a sexual harassment case.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	
I. THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED ON THIS INCOMPLETE AND AMBIGUOUS FACTUAL RECORD	9
II. SEXUAL HARASSMENT, SIMPLY BECAUSE IT IS DONE THROUGH SEX, IS NO LESS DISCRIMINATORY THAN ANY OTHER FORM OF DISCRIMINATION IN EMPLOYMENT	15
III. EMPLOYERS ARE LIABLE FOR SEXUAL HARASSMENT BY SUPERVISORS WHICH CREATES A DISCRIMINATORY WORKING ENVIRONMENT	26
IV. EVIDENCE OF DRESS AND REPORTS OF FANTASIES WAS PROPERLY EXCLUDED ON REMAND	40
CONCLUSION	44

TABLE OF AUTHORITIES

Cases	Pages
Albemarle Paper v. Moody, 422 U.S. 405 (1975)	33
Anderson v. Methodist Evangelical Hospital, 464 F.2d 723 (6th Cir. 1972)	27
Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)	10, 36, 37
Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983)	35
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)	8, 13, 20, 26, 37
Burrell v. McCray, 426 U.S. 471 (1976)	14
Cardinale v. Louisiana, 394 U.S. 437 (1969)	14
Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977)	22
Cleary v. Department of Public Welfare, 21 F.E.P. 687 (E.D. Pa. 1979)	27
Commonwealth of Massachusetts v. Painten, 389 U.S. 560 (1968)	14
Compston v. Borden, 424 F. Supp. 157 (S.D. Ohio 1976)	21, 32
Continental Can v. Minnesota, 297 N.W.2d 241 (Minn. 1980)	46
Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983)	10
Crimm v. Missouri Pacific R.R. Co., 750 F.2d 703 (8th Cir. 1984)	10
Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983)	45
DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980)	28
EEOC 84-1, EEOC Decisions (CCH) 6839 (1983)	24
EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381 (D.Minn. 1980)	22

TABLE OF AUTHORITIES—Continued

Pages

Firefighters Inst. for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir. 1977), *cert. denied,* Banta v. United States, 434 U.S. 819 (1977) 22

Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) 35

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) 21

Frontiero v. Richardson, 411 U.S. 677 (1973) 33

Garber v. Saxon Business Products, 552 F.2d 1032 (4th Cir. 1977) 10

Gay v. Board of Trustees, 608 F.2d 127 (5th Cir. 1979) 28

General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) 14

Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978) 17

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 14, 20

Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235 (5th Cir. 1973), *cert. denied,* 414 U.S. 819 (1973) 35

Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985) 10, 31

Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228 (1972) 15

Jeppson v. Wunnicke, 611 F. Supp. 78 (D. Alaska 1985) 20, 21

Jones v. State Board of Education, 397 U.S. 31 (1970) 10

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 10, 37, 39

Kelly v. Richland School Dist. 2, 463 F. Supp. 216 (D.S.C. 1978) 27

TABLE OF AUTHORITIES—Continued

Pages

Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978) *aff'd.,* 647 F.2d 333 (3rd Cir. 1981) 34

McNabb v. Cub Foods, 352 N.W.2d 378 (1984) 21

Micari v. Mann, 481 N.Y.S.2d 967 (Sup. 1984) 45

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) 10, 34

Mississippi University for Women v. Hogan, 458 U.S. 725 (1982) 38

Mitchell v. Oregon Frozen Foods Co., 361 U.S. 231 (1960) 11

Musikiwamba v. Essi, Inc., 760 F.2d 740 (7th Cir. 1983) 38

Needelman v. U.S., 362 U.S. 600 (1960) 10

Neidhardt v. D.H. Holmes, 21 F.E.P. 456 (E.D. La. 1979), aff'd. mem. 624 F.2d 1097 (5th Cir. 1980) 39

Padilla v. Stringer, 395 F. Supp. 495 (D.N.M. 1974) 32

Priest v. Rotary, 98 F.R.D. 755 (9th Cir. 1983) 43

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 14

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 10

Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) 28, 35

Simmons v. Lyons, 746 F.2d 265 (5th Cir. 1984) 10

Slack v. Havens, 7 F.E.P. 885 (S.D. Cal. 1973), *aff'd.,* 522 F.2d 1091 (9th Cir. 1975) 31

State v. Bernier, 491 A.2d 1000 (R.I. 1985) 43

Stubbs v. United States, 744 F.2d 58 (8th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 2113 (1985) 15

TABLE OF AUTHORITIES—Continued

	Pages
Tacon v. Arizona, 410 U.S. 351 (1973)	14
Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981)	21
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	14
Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3rd Cir. 1977)	10, 17
United States v. Buffalo, 457 F. Supp. 612 (W.D. N.Y. 1978)	23
U.S. Postal Service v. Aiken, 460 U.S. 711 (1983)	14, 38
United States v. Kasto, 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979)	42
Vinson v. Taylor, 27 F.E.P. 948 (D.D.C. 1980)	4
Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985)	*passim*
Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985)	*passim*
Wainwright v. City of New Orleans, 392 U.S. 598 (1967)	12, 13
Walthall v. Blue Shield, 12 F.E.P. 933 (N.D. Cal. 1976)	28
White v. North Louisiana Legal Assistance Corp., 19 F.E.P. 307 (W.D. La. 1979)	32
Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976)	34
Young v. Southwestern Savings & Loan Assn., 509 F.2d 140 (5th Cir. 1975)	28, 35
Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wisc. 1984)	21

TABLE OF AUTHORITIES—Continued

	Pages
STATUTORY, LEGISLATIVE AND ADMINISTRATIVE AUTHORITIES	
124 *Cong. Rec.* S 18580 (daily ed., Oct. 12, 1978)	42
124 *Cong. Rec.* H 11944-11945 (daily ed., Oct. 10, 1978)	42
EEOC *Guidelines on Discrimination Because of Sex*, 29 C.F.R. 1604.11 (1984)	8, 24, 28, 36
Fed. R. Civ. Pro. Rule 26(b)	43
Fed. R. Evid. 404(a)	43
Fed. R. Evid. 412	42
Fed. R. Evid. 608	44
H.R. Rep. 92-238, 92nd Cong., 1st Sess. 4-5 (1971)	33
S. Rep. 92-415, 92nd Cong., 1st Sess. 7-8 (1971)	33
Title 42, United States Code (1982) §§ 2000e *et seq.* (Title VII, Civil Rights Act of 1964, as amended)	*passim*
OTHER AUTHORITIES	
Fryer-Cohen and Vincelette, *Notice, Remedy, and Employer Liability for Sexual Harassment*, 35 Lab. L.J. 301 (May, 1984)	15
L. Hansberry, *To Be Young, Gifted, and Black* (1969)	46
W. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (1968)	46
Letwin, *"Unchaste" Character, Ideology and the California Rape Evidence Laws*, 54 S.Cal. L. Rev. 35 (1980)	41
C. MacKinnon, *Sexual Harassment of Working Women* (1979)	17, 21, 26, 29, 34, 45

TABLE OF AUTHORITIES—Continued

Pages

Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449 (1984) 35

D. Russell, *Sexual Exploitation* (1984) 40

U.S. Merit System Protection Board, *Sexual Harassment in the Federal Workplace: Is It a Problem?* (March, 1981) 15

SUMMARY OF ARGUMENT

The present cloudy and incomplete factual record is inappropriate as a vehicle for this Court's first decision on employer liability for environmental sexual harassment by supervisors. There are no factual findings on whether sexual intercourse occurred between the parties, or on whether the workplace was characterized by pervasive sexual offense against women workers, including respondent, or on whether Ms. Vinson was constructively discharged. The absence of a finding on environmental sexual harassment renders hypothetical any consideration of questions like whether the employer was told of the situation or should have known about it—hence whether notice and knowledge should matter for liability in environmental cases. Of what should the employer have been told? Of what should it have known? Further, without knowing the conditions under which the parties' ended their employment relationship, it is unclear just what kind of sexual harassment case this will turn out to be on remand. As a vehicle for resolving issues of employer liability, such flaws render this record, upon re-examination, so inadequate to an adjudication of the legal issues raised that the writ of certiorari should be dismissed as improvidently granted.

Should this Court reach the merits, it should hold that conditioning economic survival on sexual submission is as invidious a practice of discrimination as any other. Its effect on the equal treatment of individuals at work

without regard to sex is as destructive as any other. This is as true when employees *de facto* must tolerate a workplace setting permeated with sexual hostility and denigration in order to keep a job, as it is when exchange of sexual compliance for a job is overtly proposed. So long as abusive treatment is differentially based on gender and is employment-related, employers should receive no special latitude in liability because the abuse is accomplished by sexual means. Nor should the rules of evidence be rewritten because the discrimination is sexually inflicted, admitting plaintiff character evidence where is would otherwise be excluded.

———o———

STATEMENT OF THE CASE

Respondent Mechelle Vinson sued petitioner Meritor Savings Bank ("Bank") and her supervisor there, Sidney Taylor, for sexual harassment in employment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (1982) ("Title VII"). Ms. Vinson alleged that Mr. Taylor, who hired and supervised her, imposed unwanted sexual advances at work and unwelcome sexual activity as a requisite of her employment with petitioner. (Joint Appendix ("JA") 4-5.) She further alleged that Mr. Taylor altered her personnel records to cover himself and sexually harassed other women subordinates at the Bank. (JA 5.)

Ms. Vinson filed her complaint while still an employee of the Bank (JA 1), and one day after she (on advice of counsel) did not report to work and notified Mr. Taylor that she was ill and would be on sick leave indefinitely. (JA 1; Appendix to Petition for a Writ of Certiorari ("App.") 43a.) About a month later, the Bank sent her a letter (which she did not receive) stating: "In as much as you have refused to meet with me to discuss this problem, we assume that you have elected to voluntarily terminate your employment with the Association and we will consider you no longer employed as of this date." (JA 16.) In a letter of the same date, Ms. Vinson wrote the Bank stating that "due to the level of harassment and the unprofessional atmosphere that exists in my direction at your Northeast Office, I am forced to submit this letter of constructive resignation." (JA 17.)

Mr. Taylor denied that he sexually accosted or pressured Ms. Vinson or other women on the job. He denied that they had sexual relations. He denied doctoring her employment record. (JA 8.) The Bank, by contrast, took the position *arguendo* that any sexual relationship between Ms. Vinson and Mr. Taylor had been consensual. In any event, the Bank pleaded, it was not responsible because any such behavior was extra-curricular and it had not known about it. (JA 11, 12.)

Ms. Vinson was denied leave to amend the complaint to add constructive discharge and other retaliatory acts, to add other victims of Mr. Taylor's sexual aggrandisement, and for reinstatement, declaratory relief, and tort claims for assault, battery, and intentional infliction of emotional distress. (Docket Sheet.) However, pretrial statements, trial briefs, and proposed findings of fact of

all parties addressed termination and backpay. The district court's pretrial order specifically "incorporate[d] claims set forth in the respective pretrial statements" as triable matters.

At trial, Ms. Vinson testified to repeated outrages of sexual attention and aggression by her supervisor, including 40 or 50 episodes of undesired and traumatic sexual intercourse over a 20 month period between 1975 and 1977. (TR, Jan. 22, II, 51-59, 67-73; App. 32a.)[1] Her physical and emotional suffering was testified to include bleeding and infections, inability to eat or sleep normally, loss of hair, and extreme stress and nervousness (TR, Jan. 22, II, 77-78; TR, Jan. 23, III, 51), with one attack so violent that she bled from the vagina for weeks. (TR, Jan. 22, 1980, II, 78.) Although Ms. Vinson testified she repeatedly pleaded with Mr. Taylor to leave her alone, her compliance with forced intercourse was exacted by his intimidation and threats of reprisals, including against her job. (TR, Jan. 22, II, 67, 73, 81; TR, Jan. 24, IV, 24-25, 28, 50, 65.) Mr. Taylor ceased forcing intercourse upon her after she acquired a steady boyfriend (TR, Jan. 24, IV, 88-89), but continued to impose himself upon her sexually at work in other ways. He still fondled her and molested her, exposed himself to her, and barged into the ladies room

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[1] References to the partial trial transcript which has been lodged with this Court will be preceded by TR, followed by date, volume and page. The transcript is incomplete due to respondent's lack of financial resources. Although granted permission to proceed *in forma pauperis*, Ms. Vinson's motion for a transcript was denied by the district court, which noted it "cannot find that this appeal presents a substantial question which requires a transcript to be furnished at taxpayers' expense." *Vinson v. Taylor*, 27 F.E.P. 948, 950 (D.D.C. 1980.)

when she was there. (TR, Jan. 22, II, 64, 71, 80; TR, Jan. 24, IV, 65); *See also* TR, Jan. 21, I, 42-43 (Testimony of C. Malone).

Christine Malone and Mary Levarity, among other co-workers of the Bank, testified that they had seen Mr. Taylor sexually accost, abuse, and handle Ms. Vinson at work, that she repeatedly asked him to stop, and that she appeared upset by it. (TR, Jan. 21, I, 34-38, 40) (Testimony of C. Malone); (TR, Jan. 28, VI, 25) (Testimony of M. Levarity). They said he had committed similar transgressions against them as well. (TR, Jan. 28, IV, 9-14.) "Yes, it did come a time when he would put his hands on my breasts and he would put his hands on my backside and it was just disrespectful. That just tore me down. I couldn't stand it." (TR, Jan. 21, I, 21) (Testimony of C. Malone). Some of this evidence was admitted, and some of it was not. (e.g. TR, Jan. 21, I, 5, 20, 21, 25, 30 (Testimony of C. Malone)).

Ms. Vinson further testified that particularly after their sexual intercourse stopped, Mr. Taylor tampered with her personnel records, lodged false complaints about her with management, denigrated and abused her in front of other workers, entrapped her into work errors, escalated his campaign of fault-finding against her job performance, and threatened her life when she threatened to report him. (TR, Jan. 23, III, 50-52, 55; TR, Jan. 24, IV, 24-25.) She testified she was forced by the intolerable conditions to terminate her employment and was in effect constructively discharged. (TR, Jan. 22, II, 6; TR, Jan. 23, III, 55, 60, 64; TR, Jan. 25, V, 16.)

Also according to her testimony, Ms. Vinson did not report Mr. Taylor's misconduct to other employer author-

ities—other than to complain of his sexual harassment of two other women to David G. Burton, Vice President—because Mr. Taylor threatened to kill her or have her raped if she did so. (TR, Jan. 24, IV, 25.) "My life was put on the line. I didn't know what might happen to me. Christina was raped. She almost lost her mind. I saw things that went on in the bank and I didn't want anything to happen to me. My life was very valuable to me." (objection sustained to strike reference to rape of C. Malone as to truth of matter alleged) (TR, Jan. 24, IV, 28). "I was always afraid of Mr. Taylor up until the day I left." (TR, Jan. 24, IV, 99.) Ms. Vinson's complaint to Mr. Taylor about his mistreatment of other women at the Bank supported her sense of the futility of reporting: "[he said] that was his way of relaxing them, and if they didn't like it, they can get the hell out and I can get the hell out." (TR, Jan. 23, III, 48) (Testimony of M. Vinson). Both Ms. Malone and Ms. Levarity testified that they told ("Q: And you used there terms, 'sexual harassment?' A. Correct") (TR, Jan. 25, IV, 56-57) (Testimony of M. Levarity) or tried to tell (TR, Jan. 21, I, 97-101) (Testimony of C. Malone) Mr. Burton of the situation, but he was unreceptive and took no action. (TR, Jan. 23, III, 76) (Testimony of M. Vinson); *See also* TR, Jan. 22, II, 8 (Argument of counsel for the Bank).

The Bank had a policy against sex discrimination headed by Mr. Burton with implementation delegated to "each officer and department head" rather than to any specific procedure. (JA 25.)[2] The Bank's general internal

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[2] This policy statement also notes, "there appears to be an underutilization of females in positions of higher responsibilities, particularly at the officer level." (Defendant's Exhibit 7, at 5.)

grievance procedure required an employee to "state his grievance in writing and present it to his supervisor . . . only after oral representation has been made and it is felt that the grievance has not been fully resolved." (Plaintiff's Exhibit 13, at 11.)

Mr. Taylor denied making sexual advances to Ms. Vinson and contended the suit was in retaliation for a business-related dispute. He said there had been no sexual relationship, consensual or otherwise, between himself and Ms. Vinson. The Bank also disputed Ms. Vinson's allegations. One witness testified that Ms. Vinson, in her view, wore provocative clothing and said she fantasized about sex, testimony admitted over objection. (TR, Jan. 30, 14, 48.) The Bank also presented testimony that its corporate officers did not know of Mr. Taylor's alleged misconduct. (See generally TR, Jan. 31, VIII) (Testimony of D. Burton).

The trial judge denied relief. Neither plaintiff's proof of forced sex nor defendant's denial that any sex occurred was accepted. Instead, Penn, J., held that "*if* the plaintiff and Taylor did engage in an intimate or sexual relationship . . . [it] was a voluntary one by plaintiff . . ." (App. 42a) (emphasis added). The court found Ms. Vinson was "not required to grant Taylor . . . sexual favors as a condition of either her employment or in order to obtain promotion" (App. 42a) and no one properly reported the abuse alleged (App. 43a.) The conflicting testimony on constructive discharge was not resolved. The Bank was held blameless, since "notice to Taylor should [not] amount to notice to the bank" (App. 41a.) In any case, no actionable events had occurred. (App. 43a-44a.)

The Court of Appeals for the District of Columbia Circuit, Robinson, J., reversed and remanded. *Vinson*

v. Taylor, 753 F.2d 141, 152 (D.C. Cir. 1985) (App. 1a-21a, 21a). The Court of Appeals noted that unwelcome sexual advances and initiatives are actionable in themselves when they poison the workplace with a pervasive atmosphere of discrimination. 753 F.2d at 144-45 (App. 6a-8a) (citing *Bundy v. Jackson,* 641 F.2d 943-44 (D.C. Cir. 1981)). Sexual behaviors which create an "intimidating, hostile, or offensive working environment" 753 F.2d at 146 (App. 9a) (quoting EEOC *Guidelines on Discrimination Because of Sex,* 29 C.F.R. 1604.11 (a) (3) (1984) constitute sex discrimination separate and apart from ultimate sex acts to which a job is held hostage.

Since the trial court did not rule on whether the Bank condoned sexual innuendo and pressure as a condition of working there, the finding that the parties' sexual contact, if it occurred, was voluntary, did not dispose of all of Ms. Vinson's sexual harassment claims. This legal error might, further, have tainted the findings that were made. 753 F.2d at 145 n.32 (App. 7a-7b n.32). Further findings on the separate issue of the working environment created by the supervisor's sexual initiatives and advances were therefore required. Stressing the power of the supervisor in the workplace as well as the statutory language of Title VII, the court directed that on remand the employer be held liable if supervisorial sexual harassment created a discriminatory work setting. 753 F.2d at 150 (App. at 18a).

The Court of Appeals disapproved the possible role of irrelevant evidence of plaintiff's dress and alleged fantasies in the decision below. Finding that these matters "had no place in this litigation," they were directed excluded on remand. 753 F.2d at 146 n.36 (App. 9a n.36). In addition, clear error was found in the trial judge's

exclusion of some evidence to show that Mr. Taylor sexually harassed other women at the Bank, 753 F.2d at 146 (App. 10a), a ruling not disputed here by petitioner. Amendments to the complaint were invited on remand by the court expressly "intimat[ing] no view on the disposition to be made should Vinson renew the motion on remand." 753 F.2d at 146 n.36 (App. 9a n.36.)

Rehearing *en banc* was denied, 760 F.2d 1330 (D.C. Cir. 1985), with three judges dissenting, 760 F.2d 1330 (App. 22a-29a) (Bork, J.). In the view of the dissenters, the Court of Appeals' decision to exclude evidence of the victim's dress and fantasies would unfairly restrict defendants' ability to prove innocence of sexual force. 760 F.2d at 1331 (App. 22a). They also questioned whether acts which are so difficult to police and were here found to have freely occurred should make an employer liable for sex discrimination. 760 F.2d at 1331 (App. 22a).

Certiorari was granted.

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ARGUMENT

I. THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED ON THIS INCOMPLETE AND AMBIGUOUS FACTUAL RECORD.

This is the first sexual harassment case to reach this Court. On certiorari this Court requires that cases present issues through factual records that are clear, reasonably complete, specific and unclouded by crucial ambiguities. By these standards, the present record is not a proper

vehicle for resolving the legal issues it poses. Ambiguity in a key fact can "sufficiently cloud[] the record to render the case an inappropriate vehicle for this Court's first decision" in a new area. *Jones v. State Board of Education,* 397 U.S. 31, 32 (1970) (*per curiam*) (dismissing the writ).[3] In *Jones,* the record was clouded by a fact that might have presented an issue other than the one the petition sought to address. In the case at bar, the record is occluded by *absence* of facts necessary to present the issues petitioners raise.

The writ has been dismissed in prior cases for lack of "reasonable clarity and definiteness" in the facts, *Rescue Army v. Municipal Court,* 331 U.S. 549, 568 (1947) or when "the record does not adequately present the questions tendered in the petition." *Needelman v. U.S.,*

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[3] The parties concur with all circuit courts and all amici that *quid pro quo* sexual harassment is a claim for sex discrimination under Title VII. *Horn v. Duke Homes,* 755 F. 2d 599 (7th Cir. 1985); *Crimm v. Missouri Pacific R.R. Co.,* 750 F.2d 703 (8th Cir. 1984); *Simmons v. Lyons,* 746 F. 2d 265 (5th Cir. 1984); *Craig v. Y & Y Snacks Inc.,* 721 F. 2d 77 (3rd Cir. 1983); *Katz v. Dole,* 709 F. 2d 251 (4th Cir. 1983); *Garber v. Saxon Business Products,* 552 F. 2d 1032 (4th Cir. 1977); *Miller v. Bank of America,* 600 F. 2d 211 (9th Cir. 1979); *Tomkins v. Public Service Electric & Gas Co.,* 568 F. 2d 1044 (3rd Cir. 1977); *Barnes v. Costle,* 561 F. 2d 983 (D.C. Cir. 1977). The instant case, as currently shaped by trial and appeal, does not pose a simple extreme *quid pro quo* of sexual compliance in exchange for a job. Any such issues, involving for example a possible constructive discharge, remain for factual development on remand. Thus the question is not raised of whether employers, including those without notice other than to the perpetrator, are responsible under Title VII in *quid pro quo* situations, as they have universally been held to be in the cases referenced this note *supra.* Any adequacy of this record to pose these issues for review is thus irrelevant to a dismissal of the writ, since they are neither posed nor contested here. (See Petition for Writ of Certiorari at 6 n.3; Reply Brief of Petitioner at 1).

362 U.S. 600 (1960). Petitioners argue that environmental sexual harassment should not be actionable as sex discrimination. They argue that employers should not be responsible for such acts as do occur from supervisors to subordinates, especially if no employer authority other than the supervisor/perpetrator was told of the situation. Facts and factual inferences bearing on these issues include: whether the alleged sex acts occurred, and if so whether they were unwelcome; whether sexual harassment was a condition of the working environment, and if so whether the employer knew or should have known about it.

On this record, one still cannot say whether the sexual intercourse of which Ms. Vinson complained occurred. One key factual finding is that "if the plaintiff and Taylor did engage in an intimate or sexual relationship . . . [it] was a voluntary one by plaintiff . . ." (App. at 42a). The opacity and indefiniteness of this statement is so extreme that it finds no fact at all. To put it mildly, this creates "ambiguities in the record as to the issues sought to be tendered." *Mitchell v. Oregon Frozen Foods Co.,* 361 U.S. 231 (1960) (*per curiam*) (dismissing certiorari)

As the record stands, sexual intercourse may or may not have occurred, making purely projective any conclusion as to its welcomeness. Moreover, no finding even purports to be made on environmental sexual harassment by a supervisor. That also may or may not have occurred, making the welcomeness of advances wholly hypothetical and any consideration of notice, knowledge, policy or procedure, and obligation to cure wholly abstract. When "the facts necessary for evaluation of the dispositive . . . issues . . . are not adequately presented by the record,"

Wainwright v. City of New Orleans, 392 U.S. 598, 598-599 (1967) (Fortas and Marshall, J.J., concurring), the writ is properly dismissed. These lacunae leave open a disputed question of material fact, confound review for legal error, and make this case inappropriate as a vehicle for creating new law. Absence of facts is the most extreme violation imaginable of this Court's standards of clarity, specificity, and adequacy. It renders impossible a realistic assessment of the Title VII requirements that should attach in cases that *do* present these issues.

There is no finding of fact as to whether Mr. Taylor routinely initiated sex with the women under his supervision at the Bank, including Ms. Vinson. Therefore, no finding is possible on whether Ms. Vinson welcomed sexual by-play at work, precluding in turn any inquiry into whether the context was consensual or forced. The result is, this case has reached this Court, *not* on a motion to dismiss, and it is still correct, as petitioner does, to refer to the "alleged advances." (Brief of Meritor Savings Bank, FSB, ("Bank") 26). The Bank in effect seeks review as if on a motion to dismiss with the ground rules reversed: as if the plaintiff's original allegations can be taken as *disproven* and only issues of legal adequacy remain. To the contrary, at this point in the case, a ruling on whether or not environmental sexual harassment occurred as a matter of fact is essential to a decision on whether environmental sexual harassment is actionable sex discrimination under Title VII as a matter of law. One of the plaintiff's allegations and theories at

trial—that unwelcome advances permeated the workplace—remain factual showings under a legal theory which the trial judge has not ruled upon one way or the other. The uncontested ruling by the Court of Appeals that it was error to exclude evidence of coercive advances to other women on the job highlights the inadequacy of any inference that could be made on this point at this time.

The lack of any finding on whether Mr. Taylor, through unwanted sexual mistreatment of women on the job, created a discriminatory work environment makes "this record too opaque to permit any satisfactory adjudication" *Wainwright v. City of New Orleans*, 392 U.S., at 598 (Harlan, J., concurring) of the question of the conditions under which employers ought to be held responsible for sexual harassment by supervisors in the workplace environment. Without a specific finding on the existence, pervasiveness, and welcomeness of Mr. Taylor's sexual initiatives, this Court cannot know if any advances were welcome on the one hand, unwelcome but permitted almost as a matter of policy on the other, *see Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981)—or unwelcome and by a supervisor, as yet a third legal possibility. Whether to require knowledge of the events by others in the employer hierarchy for corporate liability to attach might, according to the circumstances, be held to depend to some degree on whether the sexual atmosphere was so pervasive as to constitute an environment, ignorance of which was impossible. It might depend upon whether the terror created by the supervisor's advances was effective in creating an environment so pervasive and coercive that it was insulated from reports by victims. Both are possible readings of this trial transcript, but it would engage this Court in fact-finding

to construe it. Yet petitioner seeks to litigate the triggers of employer liability for supervisors' environmental sexual harassment of subordinates in their absence.

The Court of Appeals properly found the claim of coercive advances as a condition of work to be raised by the case but unresolved by the trial judge, hence it remanded. If Ms. Vinson's constructive discharge continues to be an issue on remand, this case may yet turn out to be a *quid pro quo* in which sexual compliance is exchanged for a job, in addition to an environmental case. See *Henson v. City of Dundee,* 682 F.2d 897, 908 n.18 (11th Cir. 1982). Nor is there any finding on intent, also factual in nature, *Pullman-Standard v. Swint,* 456 U.S. 273, 287-8 (1982); *General Building Contractors Ass'n v. Pennsylvania,* 458 U.S. 375, 381 n.6 (1982); *U.S. Postal Service v. Aiken,* 460 U.S. 711, 715 (1983). This issue was raised for the first time (and doctrinally incorrectly, see n.16 *infra*) in the Bank's petition for certiorari. "We cannot decide issues raised for the first time here. *Cardinale v. Louisiana,* 394 U.S. 437 (1969)." *Tacon v. Arizona,* 410 U.S. 351, 352 (1973) (*per curiam*) (dismissing the writ).

Granting certiorari prior to remand has rendered "the record . . . not sufficiently clear and specific to permit decision of the important . . . questions involved in this case." *Commonwealth of Massachusetts v. Painten,* 389 U.S. 560, 561 (1968) (*per curiam*) (dismissing the writ). These defects in the factual record may not have been "fully apprehended at the time certiorari was granted." *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 183 (1959). *See also Burrell v. McCray,* 426 U.S. 471, 472 (1976) (Stevens, J., concurring in dismissal of certiorari).

Taken together, the insufficiencies of this record reveal that the reasons for granting certiorari put forth in the petition are, on re-examination, not supported by the record in this case. *See Iowa Beef Packers, Inc. v. Thompson,* 405 U.S. 228, 230 (1972). The writ should be dismissed as improvidently granted.

II. SEXUAL HARASSMENT, SIMPLY BECAUSE IT IS DONE THROUGH SEX, IS NO LESS DISCRIMINATORY THAN ANY OTHER FORM OF DISCRIMINATION IN EMPLOYMENT.

There is no disagreement before this Court that sexual harassment states a claim for sex discrimination under Title VII, a view which has been adopted by every Circuit that has considered the issue. (citations, n.3 *supra.*) Sexual harassment ranks "among the most offensive and demeaning experiences that an employee can have." Fryer-Cohen and Vincelette, *Notice, Remedy, and Employer Liability for Sexual Harassment,* 35 Lab. L. J. (May, 1984) at 301, 307. It damages individuals, *see e.g. Stubbs v. United States,* 744 F.2d 58, 60-61 (8th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 2113 (1985) (wrongful death action for suicide to avoid sexual harassment) and is economically costly, U.S. Merit System Protection Board, *Sexual Harassment in the Federal Workplace: Is It a Problem?* (March, 1981) at 14 (in two year period, sexual harassment of federal workers cost taxpayers $189 million in health costs, low productivity and job turnover). Yet the Bank argues for operative rules for adjudicating these claims that would make sexual harassment into a second-class discrimination claim. On the ground that "sexual activity is special," (Bank, 37) the Bank would render sexual harassment an

injury especially difficult for victims to prove. By attenuating employer liability (see III *infra*), it would become an injury without effective remedy. In the case of environmental claims, the Bank (but not *amicus* United States, Brief for the United States and the EEOC as *Amicus Curiae,* ("US") at 15) would eliminate it from Title VII coverage altogether.

Each distinctive practice of, and basis for, claims under Title VII has recognized particularities. But if treatment is proven to be based on a prohibited classification[4], and if it does damage in employment, it is employment discrimination and therefore illegal. The Bank argues for a legal double standard by distinguishing first between sexual *harassment* and other forms of sex discrimination, and second between *sexual* harassment and harassment on the basis of other protected classifications like race and religion. Sexual harassment as a legal claim would emerge eviscerated as a result.

Because sexual harassment is sexual, the Bank argues, it is not fully discrimination. Its inherently "personal" quality is said to distinguish it from other forms of pur-

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[4] Unwanted bisexual advances may mean either that both women and men are injured on the basis of their gender, or that because both are, no basis in gender exists. Title VII sets itself primarily against differential treatment. If an employer fires everyone, Black and white alike, it is regarded as improbable, although not impossible, that the reasons were racist because the treatment is racially even-handed. By the same token, a conclusion that indiscriminate treatment, however injurious, may provide a defense to a claim of group-based discrimination does not, as the Court of Appeals dissenters would have it, 760 F.2d at 1333 n.7 (App. 28a n.7) invalidate a law against conduct that is directed exclusively against members of one group.

portedly anonymous gender-based treatment.[5] Whether a specific situation alleged to be sexual harassment is truly personal, as opposed to gender-based and work-related, is a question of fact not of law, as courts have uniformly held. *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1388 (D. Colo. 1978); *Tomkins v. Public Service Electric & Gas Co.*, 568 F. 2d 1044, 1047 n.3 (3rd Cir. 1977). See also C. MacKinnon, *Sexual Harassment of Working Women* (1979) ("MacKinnon") 83-90, 235-236 (appellate reversals of rulings that sexual harassment is "personal" as a matter of law). If a situation is found to be sexual harassment, it does not become *not* sex discrimination because it is sexual. Rather, it presents a form of discrimination which is particularly personally invasive.

Sexual advances and activities become talismanic in the Bank's perspective. It would impose greater burdens on a plaintiff when sex is involved than when discrimination is accomplished through other means. This approach turns on use of the phrase "sexual activity" to refer to welcome and forced sex alike, as if the two are properly indistinguishable for legal purposes. (Bank, 10, 13.) Whatever specialness inheres in sex, it inheres in sex freely chosen. To the degree that freely chosen sex is special, forced sex

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[5] A further distinction may be suggested *sub rosa* by the brief for the United States. It implies that while other discrimination may be done for the benefit of the company, sexual harassment is done for the personal benefit of the discriminating individual. (US, 24, 27.) Exploitation through pay inequity may be good for balance sheets, but exclusion of qualified job applicants because they are minority or female, for example, deprives companies of needed talent. Just as sexual harassment presumably gratifies harassing individuals, other forms of discrimination may subjectively benefit perpetrators, who thus express and reinforce their social superiority, regardless of objective harm to the company.

violates that specialness. Sexual harassment by definition is never wanted. 29 C.F.R. 1604.11(a) (sexual harassment is "unwelcome sexual advances" under certain conditions). If it may be said to be special at all, it is especially abusive. Yet both the Bank and their *amici* conflate unwanted forcible sexual initiation with welcome friendly suggestions. They equate forced sex with all sex, implying that if wanted sex has value, forced sex must also, a value to be recognized by special legal exemption. The value of something freely done, like philanthropy, does not undermine the culpability of the same act when it is forced, as with theft. The fact that episodes that are not sexual harassment do occur does not mean that episodes that *are* sexual harassment should not be actionable, with all other sex discrimination.

The Bank further argues that environmental harassment based on sex by supervisors of subordinates is not like harassment by identically situated persons when based on race or religion or national origin, because sexual advances may be wanted while racial invective is never wanted. Sexual *abuse* is no more wanted than racial abuse, and friendly discussions of race are no more inherently offensive than friendly discussions of sex. Similarly, one's ethnic identity is not inherently negative, but rather is a positive and personal (as well as collective) attribute. That does not render it a category open to special abuse under equal employment opportunity laws. Sexual characteristics, words, behaviors, or activities are no more or less inherently socially offensive or harassing than are corresponding racial or religious characteristics or designations or traditions.

The Bank further seeks to distinguish sexual harassment as an environmental condition of work from sexual

harassment as a *quid pro quo*, arguing that a pervasive context lacks tangibility. (Bank 31, 37.) First, the Bank seeks to litigate this issue by proceeding as if it can assume that the environmental sexual harassment alleged in this case *did not occur*. There is as yet no factual finding to this effect, and there is substantial evidence to the contary. Christine Malone testified that Mr. Taylor "would put his hands on my breasts and he would put his hands on my backside. . . ." (TR, Jan. 21, I, 21.) Asked how often, she responded, "He did it all the time. It was constantly . . . . It was every day. Every day we worked there." (TR, Jan. 21, I, 40.) Ms. Vinson testified that "he would touch me practically every day . . . .Whenever he felt like it." (TR, Jan. 22, II, 71.) "Each day was a touching day. Each day was a mental day." (TR, Jan. 22, II, 80.) "I felt humiliated. I felt powerless. I was afraid of him." (TR, Jan. 22, II, 66.) The witnesses also corroborated each other's reports, *e.g.* "I observed Mr. Taylor touching Christina on her . . . rear end, touching her breasts and chasing her in the back . . . ." (TR, Jan. 22, II, 33) (Testimony of M. Vinson); "I heard him tell Mechelle that he wanted to fuck her." (TR, Jan. 28, IV, 25) (Testimony of M. Levarity); "He would often touch her body and fondle her." (Def't Ex. 43) (Affidavit of M. Levarity).

Sexual insult and aggression against women as a pattern in the working environment was an explicit part of counsel's theory of the case at trial: "overt acts of discrimination against other women in the environment [is] part of my *prima facie* case . . . ." (TR, Jan. 23, III, 45.) This evidence was argued to show that the advances against Ms. Vinson were based on sex, and also to show "the environment that Miss Vinson went into." (TR, Jan. 21, I, 21.)

"Evidence of how he treated other women, that is members of the protected class, is admissible to prove that he in fact treated Miss Vinson in a discriminatory manner." (TR, Jan. 21, I, 16) (Argument of counsel for the plaintiff). One purpose of the remand is to allow evidence improperly excluded—*e.g.* objection sustained to evidence proffered to show "the daily environment . . . encountered whenever Mr. Taylor was . . . in that office" (TR, Jan. 23, III, 4) — with latitude to amend the complaint to conform to the proof, 753 F.2d, at 142 n. 12 (App. 3a-4a, n. 12), in order to rule on this issue.

Second, the two recognized forms of sexual harassment are not a hard distinction. Rather, they are more like poles of a continuum that operates on a time line. For instance, if a victim of environmental sexual harassment leaves the job for that reason, the resulting constructive discharge becomes a *quid pro quo*. Courts have recognized the insufficiency of a theory of sexual harassment that does not allow a context of unwanted advances to be actionable, effectively permitting all sexual harassment that stops short of the victim quitting or being fired, or other similarly aggravated thresholds. *Bundy v. Jackson*, 641 F. 2d, at 945-946; *Henson v. City of Dundee*, 682 F. 2d 897, 908 n.12 (11th Cir. 1982); *Jeppson v. Wunnicke*, 611 F. Supp. 78, 83 (D. Alaska 1985). The legal scholar who conceptualized the types of sexual harassment criticizes the construction that "no series of sexual advances alone is sufficient to justify legal intervention until it is expressed in the *quid pro quo* form. [This] forces the victim to bring intensified injury upon herself in order to demonstrate that she is injured at all . . . [if so] long as the sexual situation is constructed with enough coerciveness, subtlety, suddenness, or one-sidedness . . . while her job is formally

undisturbed, she is not considered to have been sexually harassed." *MacKinnon*, 46-47.

Third, "Title VII's primary goal, of course, *is* to end discrimination." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) (emphasis in original). Having realized that a rigid distinction between *quid pro quo* and environmental harassment is both analytically incorrect and undermines the purposes of Title VII, one court recently stated: "Preventing sex discrimination in employment is too important a goal to turn upon the vagaries of what does and what does not constitute a *tangible* job benefit as distinguished from what is evidently considered to be an *intangible* benefit such as psychological well-being at the workplace." *Jeppson v. Wunnicke*, 611 F. Supp. at 83 (emphasis in original). *See also*, Cal. Gov't Code Section 12940 (i) (West 1980 and Supp. 1983).

There is nothing ineffable about a daily gauntlet of vitriol. Nor does it take much sensitivity to recognize that being repeatedly called "slut" and "fucking cunt" on the job, *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 789 (E.D. Wisc. 1984), *McNabb v. Cub Foods*, 352 N.W.2d 378, 381 (1984) is no less an injury of civil inequality than is being called "nigger" and "spook," *Taylor v. Jones*, 653 F.2d 1193, 1198 (8th Cir. 1981) or "Christ-Killer" and "Jew-boy," *Compston v. Borden*, 424 F. Supp. 157, 158 (S.D. Ohio 1976). In the instant case, Mr. Taylor "would make comments about my legs, said I had big hairy legs and he would like to get between them." (TR, Jan. 21, I, 21) (Testimony of C. Malone). "I observed him standing up by the wall in the bank with his penis showing through his pants showing it at Miss Vinson and myself there." (TR, Jan. 21, I, 34) (Testimony of C. Malone). He accosted the women employees, they testified, with state-

ments like, "Come and get this. Come and get this dick. You want it." (TR, Jan. 21, I, 43) (Testimony of C. Malone).

Petitioner's contrasts between discriminatory environments based on race and those based on sex distort the clear parallels between them. The Bank states that "racially or religiously derogatory workplace activity cannot reasonably be conceived as occupationally neutral or desirable. Sexual activity, on the other hand . . . may be socially acceptable . . . . " (Bank, 10.) If the parallel were drawn correctly, it would state that sexually derogatory workplace activity cannot reasonably be conceived as occupationally neutral or desirable, but not all racially specific activity, including conversation, is socially unacceptable. Voluntary discussions of race and ethnicity, including use of racial and ethnic words and jokes, is not always socially problematic. For race as for sex, the same words that can be invective in one context can have a noninvidious meaning in another. Just as there is no value to racial invective, slurs, and harassment, *see e.g. EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384 (D. Minn. 1980) there is no value to sexual invective, slurs, and harassment. Eliminating existing Title VII claims for contextual harms which are, in the Bank's diminishing phrase, "unrelated to any loss or threatened loss of tangible job benefits" (Bank, 14), would, of course, sweep away claims on the basis of religion or race as well as sex. There is no principled distinction between them. The uniform gravamen of rulings in this area is that citizens do not have to endure these atrocities to have an equal chance to make a living. *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977); *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir.

1977), *cert. denied, Banta v. United States*, 434 U.S. 819 (1977); *United States v. Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978).

Although welcomeness was not here litigated as a fact between Vinson and Taylor, the unwelcomeness of a sexual encounter in employment is crucial to a sexual harassment claim. The Court of Appeals did not hold to the contrary. It is false that the Court of Appeals "eliminates unwelcomeness as an issue." (Bank, 14.) Perhaps the Bank perceives this because it does not distinguish, as do the Court of Appeals and respondent, between sexual *advances* that are welcome and sexual *intercourse* that appears voluntary. The Court of Appeals saw that sexual advances may exist, with or without intercourse, and sexual intercourse may *appear* voluntary even though the advances that initiated it were entirely unwelcome. This assessment can not be made without looking at the advances separately, something the trial court did not do.

It should be underscored that unwelcomeness was not, as a factual matter, an issue between Vinson and Taylor. Mr. Taylor did not say that his advances were welcome, but rather that he did not make them, and not that the sex was voluntary, but rather that it did not occur. (JA 8.) The Bank denied the factual allegations concerning anything sexual between the parties on the ground that it knew nothing about it. (JA 10.) In its failure to find the facts and rule on the law of the wantedness of the advances separately, the trial court failed to rule on one of Vinson's legal claims. Moreover, it was a factual claim as to which defendant Taylor—other than Ms. Vinson the only source of facts on most of the sexual intercourse—had apparently to some degree been disbelieved. This failure, in turn, gave rise to the further concern that *plaintiff's* evidence

that sex occurred may have been misconstrued, affecting the ruling on voluntariness the lower court did make.

Each sexual harassment case is to be evaluated in light of "the totality of the circumstances," which include "the context in which the alleged incidents occurred." 29 C.F.R. 1604.11(b). In the case at bar, respondent maintains, and there is no factual ruling on the subject to disturb, she did not find Mr. Taylor's *advances* welcome. And she told him so. "I would always tell Mr. Taylor that I wished that he would stop, you know. . . Leave me alone, just leave me alone." (TR, Jan. 22, II, 67.) Other women supported this: "[Ms. Vinson] told him to remove his hands, to take his hands off her." (TR, Jan. 21, I, 36) (Testimony of C. Malone). Ms. Vinson testified, "I had no other choice." (TR, Jan. 24, IV, 50).[6] It would be consistent with the evironmental evidence to find that Ms. Vinson indicated her disinclination and repugnance to Mr. Taylor repeatedly, yet repeatedly submitted, rebuffing his attentions including those short of intercourse, but being unable to stop either the advances or the intercourse out of a combination of lack of power to make her wishes effective, lack of viable economic alternatives, and fear of reporting. "I was afraid. Fear is the wors[t] thing in the world." (TR, Jan. 23, III, 57) (Testimony of M. Vinson.) This could create a pattern that, if evaluated at trial in the absence of assessing the welcomeness of the advances themselves, could appear voluntary on her part.

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[6] There is some authority, for instance EEOC 84-1 (CCH) 6839 (1983) for the view that participation in sexual harassment evidences consent, consent which must subsequently be expressly revoked before unwelcomeness will be found. The instant case is different from EEOC 84-1, where one complainant never indicated to the perpetrator that the sexual banter was oppressive to her. Here, respondent repeatedly did so.

Since the trial court did not evaluate the atmosphere in which the advances occurred in light of applicable law, it could have interpreted plaintiff's account of the many acts of sex against a background of voluntariness and friendly mutuality, rather than against a background of hostility and force. Because the trial court did not evaluate the background at all, as under law it was obligated to do, remand was appropriate.

Thus the Court of Appeals did not hold voluntariness irrelevant nor does respondent argue that it is. Rather, the Court of Appeals correctly concluded that a ruling on voluntariness is ambiguous which does not distinguish between fearful compliance, i.e. unsuccessful resistance or hopeless nonresistance to each act at the time,[7] and mutuality of desire. Sex that kept occurring could be "a victim's 'voluntary' submission to unlawful discrimination" (App. 10a) and still be a fight repeatedly lost, or it could be free choice. Women often despairingly acquiesce in unwanted sex not only to keep their jobs at defined thresholds, but to keep their jobs on a daily basis, when the employment environment systematically requires tolerance of sexual harassment as a condition of being there. If the law of sexual harassment is inavailable to victims who have little choice but to comply, or who cannot make their rejection effective despite attempts, the consequence will be to protect all but those who need the protection the most: those who are so vulnerable that noncompliance is a physical impossibility or an unaffordable luxury. Respondent

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[7] Nonresistance does not always mean an absence of force and not all force is violent: "I can remember the violence, times he forced himself on me, but all the times he forced himself on me, he wasn't violent." (TR, Jan. 23, III, 80) (Testimony of M. Vinson).

submits that if the law of sexual harassment is useless to her because of her lack of choices, it is of little use. See *Bundy v. Jackson,* 641 F.2d at 946 (resistance not required); *see also MacKinnon,* 46-47 (futility of resistance requirement).

In some workplaces, victims who resist and/or report are met with the hostility, ridicule, and disbelief exemplified by virtually every aspect of this record except the D.C. Circuit's sensitive rendering. Ms. Vinson may have perceived that, realistically, she had no alternative to acquiescence. Realizing that this possibility had not been ruled out, the Court of Appeals simply held that, absent a holding below on the wantedness of the *advances* in the case, a ruling that the sex, if it happened, was "voluntary" did not dispose of all of respondent's Title VII claims. Because the trial court applied the wrong segment of the right law, that also tainted its finding on the part of the law it did rule on. When reassessed and ruled upon under correct law, the previous factual ruling, undisturbed yet properly recontextualized, may prove not to have told the whole story about the relationship.

III. EMPLOYERS ARE LIABLE FOR SEXUAL HARASSMENT BY SUPERVISORS WHICH CREATES A DISCRIMINATORY WORKING ENVIRONMENT.

This is the heart of the dispute. It is not an abstract contest over whether sexual harassment is sex discrimination, which is undisputed. It is a concrete conflict over whether sexual harassment will be treated *as if* it is sex discrimination: whether the employer will be responsible so that its victims will receive relief. The current record, lacking as it does any finding on the occurrence of environmental discrimination, and lacking a resolution of the constructive discharge issue, is wholly inappropriate as a vehicle for deciding this crucial matter. Should the Court reach the issue of employer responsibility for the working environment on such an inadequate record, it should hold that when a supervisor in Mr. Taylor's position sexually harasses a subordinate in Ms. Vinson's position, making her working environment sex discriminatory, the company is accountable. This should be no less the case when sexual harassment is a constant of the work environment, with tolerance the price of job security, than it is when conditions reach a more definitive *quid pro quo.*

The Bank should not be permitted to carve out sexual harassment as an anomalous and unique claim for employment discrimination: one in which the employer is not responsible for the discrimination. The liability in question here is not, properly speaking, vicarious in any sense. The terms "strict" or "absolute" liability are tort analogies that do not exhaust the distinctive concept of liability in discrimination cases. Title VII's definition of "employer" *includes* "any agent" of the employer. 42 U.S.C. 2000e (b) Supervisors are "agents" in the supervising of employees. *Cleary v. Department of Public Welfare,* 21 F.E.P. 687 (E.D. Pa. 1979); *Kelly v. Richland School Dist. 2,* 463 F. Supp. 216, 218 (D.S.C. 1978). Liability here is thus not third-party; it is first-party or nothing. Under Title VII, by statutory design and by interpretation, so long as a circumstance is work-related, the supervisor is the employer and the employer is the supervisor. The employer does not become liable through the supervisor; for purposes of discrimination, the two are one. This has always been the case for purposes of employment discrimination litigation. *Anderson v. Methodist Evangelical Hos-*

pital, 464 F.2d 723 (6th Cir. 1972); *Rowe v. General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972); *Gay v. Board of Trustees,* 608 F.2d 127 (5th Cir. 1979); *Walthall v. Blue Shield,* 12 F.E.P. 933 (N.D. Cal. 1976).

It can not be otherwise. When a supervisor discriminates, the subordinate has been discriminated against, whether anyone else in the employer hierachy was told about it or not. For example, in *DeGrace v. Rumsfeld,* 614 F.2d 796, 803 (1st Cir. 1980), the employer was held responsible for discrimination in the constructive discharge of an employee who had been fired for absenteeism and abuse of sick leave. In fact, the employee had left the workplace due to racist threats and told the employer he was ill. Similarly, in *Young v. Southwestern Savings & Loan Assn.,* 509 F.2d 140 (5th Cir. 1975), a supervisor who did not have the power to hire and fire had required attendance of an atheist at a religious meeting against company policy. The employer was held responsible for discrimination by constructive discharge when she left. Few employees are sexually harassed *ex officio* by the chairman of the company on a majority vote of the Board of Directors. The EEOC Guidelines provide for employer liability for discrimination "regardless of whether the employer knew or should have known" of the events. 24 C.F.R. 1604.11 (c).

The Bank seeks to preclude corporate liability for sexual harassment as a working environment on the same grounds on which it attempts to trivialize its harm: by separating it sharply from other forms of sex discrimination, from *quid pro quo* sexual harassment, and from cases of racial or religious bigotry. If Mr. Taylor had set all women employees' wages at less than men's because

they were women, he would have *been* the Bank. If Mr. Taylor had outright fired Ms. Vinson for her sexual noncompliance, he would have concededly been the Bank. If she had quit because of the sexual harassment, as she maintained through trial and still maintains that she did, Mr. Taylor would also perforce have been the Bank. If he had subjected Ms. Vinson to racial or religious invective, he would have been the Bank. But because the invective was sexual, not racial or religious, and because we do not yet know whether Mr. Taylor's alleged sexual advances against her on her job occurred, and because we do not yet know if a constructive discharge will make this a *quid pro quo* case, he is not the Bank, according to the Bank.

Ms. Vinson alleged discrimination by her supervisor in work and at work. She complained of damage through work, including the unspeakable violation of forced sexual access. Had Mr. Taylor not been her employing supervisor, and should his advances be found unwelcome, she arguably would not have had to "voluntarily" acquiesce in his demands for fear of job reprisals. The fact she was promoted on her merits, which is undisputed here, does not mean she *would have been* promoted on her merits had she not *also complied* with her superior's sexual demands.[8] Mr. Taylor was situated to make good on the power of

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[8] Because of sexual harassment, some women may be promoted who do not merit it because they comply sexually. But more evidence suggests that women are overwhelmingly *not* promoted who *do* merit it, because they were not sexually compliant. Both groups of women pay for a system under which supervisors' sexual proclivities are permitted to govern their personnel policies. See *MacKinnon,* 38-40.

his position, which he exercised for and as her employer. If he were found to have abused his position for sexual gain, whether he abused his role for his own sexual gratification at defined thresholds was his choice and irrelevant to employer responsibility. He may not have needed actively to use his power against specific indices of her employment *because* he had the power to do so at any time. Ms. Vinson was able to advance on her merits without the interference his advances may yet be found to have threatened (advances whose welcomeness as a matter of fact remains in dispute) because she complied. And she testified she complied because of his power as her supervisor, power he held because of his position at the Bank: "He said just like he could hire me, he could fire me. . . ." (TR, Jan. 22, II, 51.) "He told me that he was my supervisor. He gave me my pay check, and I had to do what he wanted me to do." (TR, Jan. 22, II, 59.) The minute she made her refusals effective, or his ardor cooled, he moved against her job.

The Bank accepts responsibility for sexual harassment in the hierarchical *quid pro quo* form, but not in the hierarchical environmenal form. The line between the two can be as slight as the victim leaving the job, as may turn out to be the case here. Petitioner's position would mean that a victim must elect to injure herself more than she already is — forfeit her job because the perpetrator's conduct has made it intolerable — in order to be able to hold the employer liable for injuring her at all. She must make her situation worse so that she can use the law to make it better. The law of sexual harassment should encourage employers to discourage sexual harassment, to find out about it if it is occuring, and to act against perpetrators.

The Bank's perspective, if permitted, would give the employer little incentive to do anything other than not to fire employees who are being sexually harassed when it is forced to their attention. The employer is in the best position to enforce a minimal standard of human dignity by power of position. *See* US, 26. Liability provides an incentive to do so.

The Bank wants two sets of rules, one for its hiring and firing decisions, which can include liability for *quid pro quo* sexual harassment, and another for its supervisors' sexual acts and the atmosphere their acts create in their places of work. Most of all it wants one for discrimination based on race and religion and another for discrimination based on sex. Uniquely in the case of environmental sexual harassment, the employer here seeks to hide supervisors' sexist abuses of power behind the corporate veil. See *Horn v. Duke Homes*, 755 F.2d at 604-5 (criticizing this evasion). The Bank purports to worry that the sexual harassment perpetrator is uniquely "motivated to keep his knowledge secret, not to disclose it and invite discipline for his indiscretions." (Bank, 12-13.) This is true for all discrimination, including *quid pro quo* sexual harassment. A supervisor who requires only his Black employees to clean his personal residence is unlikely to report it to the company. *Slack v. Havens*, 7 F.E.P. 885 (S.D.Cal. 1973), *aff'd.*, 522 F. 2d 1091 (9th Cir. 1975).[9]

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[9] *Slack v. Havens* reveals the falsity of the assertion by the United States that there is no racial equivalent to sexual harassment's *quid pro quo*. (US, 15 n.5.) "Had Polaski not discrimi-

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Further, petitioner argues that employers should not be liable when, as a practical matter, only the employer may be situated to provide adequate relief. At the moment, Mr. Taylor's behavior is discrimination in employment or nothing, given the trial court's denial of an attempt to amend to add tort claims. The Bank is concerned about being liable for acts it feels it did not do. Theoretically, if the Bank is not liable because the perpetrator did the act "as an individual," but the individual's liability is unclear because he is not, *as* an individual, the "employer" for purposes of Title VII,[10] some risk exists of creating a claim for employment discrimination for which nobody would be clearly liable if the injury were proved. Even individual

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nated against the plaintiffs by demanding they perform work he would not require of a white female employee, they would not have been faced with the unreasonable choice of having to choose between obeying his discriminatory work order and the loss of their employment." 7 F.E.P. at 890. Any time a person has to endure indignity or extra work or other workplace detriment because of their protected status, an implicit *quid pro quo* is involved, because their tolerance of the discrimination is the price of their job. Unless such persons are fired for resistance, the implicit bargain only becomes explicit if they sacrifice their employment opportunity and leave.

[10] Mr. Taylor's *individual* liability for his act *as* the "employer" is not entirely clear under Title VII, although it would be most peculiar to found liability *as an agent* in one whose principal was not jointly and severally liable. Those few courts that have ruled on the issue under Title VII have properly found the agent directly liable, *Padilla v. Stringer,* 395 F. Supp. 495 (D.N.M. 1974); *Compston v. Borden, Inc.,* 424 F. Supp., at 157. Yet courts at times prefer not even to permit suits against individual supervisors where full monetary relief is available from employers and injunctive relief will bind incumbent supervisors. *White v. North La. Legal Assistance Corp.,* 19 F.E.P. 307 (W.D. La. 1979) (individual not mentioned in EEOC charge).

supervisors who are held liable are less well situated than is the employer to provide make-whole equitable relief. Such relief is the primary purpose of Title VII. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975).[11]

The distinctive statutory mandate of Title VII to end invidious group-based treatment is one under which ". . . Congress itself has concluded that classifications based upon sex are inherently invidious. . . ." *Frontiero v. Richardson,* 411 U.S. 677, 678 (1973) (for a plurality).[12] To prove that employment discrimination occurred in a workplace is to prove the employer liable for it. This is because Title VII distinctively exists to prohibit and rectify injuries to, in, and of *the employment relation itself.* For this purpose, while the facts of sexual harassment may be tortious, and torts are compatibly appended in a typical claim, sexual harassment as a term of art is not technically a tort any more than other species of discrimination in employment are technically torts. Because group-based bigotry is not accidental or individualized, as torts tend to be,

[11] Only the employer is capable of rectifying harms like Ms. Vinson's allegedly altered work records and recommendation letters, which may be found part and parcel of an attempt to cover up sexual harassment. Mr. Taylor, if still employed by the Bank, could presumably hire her as previously; if not, he could not grant her reinstatement, should it be sought and granted. Further, if the advances were found unwelcome and environmental, and the perpetrator is found to be the procedure, the court might order an adequate procedure.

[12] In amending the 1964 act by passing the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 *et seq.*, Congress elaborated its intent more explicitly than it had in 1964. The committee reports emphasize that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. Rep. 92-238, 92nd Cong., 1st Sess. 4-5 (1971); S. Rep. 92-415, 92nd Cong., 1st. Sess. 7-8 (1971).

tort tests tend not to fit.[13] Thus, whether events are "outside the scope of employment" (Brief of Equal Employment Advisory Council, *Amicus Curiae,* ("EEAC"), 6) in the tort sense has been supplanted by whether the events are "work-related" in the Title VII sense. Employers are not responsible for racial or sexual insults by employers to employees if they truly are non-job related. Similarly, while concepts like *respondeat superior* were sometimes used early and almost in an ordinary language sense or as an analogue, in order to make clear that employers could not evade responsibility for such acts by supervisors, *Miller v. Bank of America,* 600 F.2d 211 (9th Cir. 1979), later authority has tended to rest on Title VII statutory construction, implicitly rejecting any technical limitation that some views of *respondeat superior* might impose on employer liability for discrimination in Title VII areas.

When petitioner challenges whether Title VII was meant to regulate what is diminished as the "purely psychological aspects of the workplace environment" (Bank, 30), it also questions accepted authority that environmental sexual harassment by supervisors without further notice to the employer states a claim under Title VII. *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, 935 (D.N.J. 1978),

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[13] Had tort been adequate to the discriminatory harm of sexual harassment, the injury would likely have been recognized prior to its address under Title VII. Before *Williams v. Saxbe,* 413 F. Supp. 654 (D.D.C. 1976), the first case squarely to recognize sexual harassment as a violation of anti-discrimination law, perhaps two or three cases with facts amounting to sexual harassment had been reported brought in tort. (*See MacKinnon,* 164-174.) Since *Williams,* several hundred have been reported in the federal system alone, many more under state laws, an unknown number settled or resolved by administrative agencies or internal grievance mechanisms.

aff'd., 647 F.2d 388 (3d Cir. 1981); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Young v. Southwestern Sav. & Loan Assn.*, 509 F.2d at 144 n.7; *Rowe v. General Motors Corp.*, 457 F.2d at 359.[14] Further seeking to evade responsibility for its supervisor's conduct, the Bank seeks a ruling that, as a matter of law, employers must receive notice that supervisors are sexually harassing subordinates at work as a precondition for liability, and notice to the perpetrator can not be notice to the employer. (Bank, 22.) In other cases of employment discrimination, and by statute, the supervisor is the employer, and no further notice is needed.[15] Because a supervisor is an agent of the employer, an employee puts the employer on actual notice simply by notifying the supervisor. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII,* 97 Harv. L. Rev. 1449 (1984) at 1460-1463. Respondent repeatedly, according to her testimony, told Mr. Taylor that she wanted him to stop, leave her alone, and let her work in peace. (TR, Jan. 22, II, 67; TR, Jan. 24, IV, 65.) Should Mr. Taylor's actions be found to constitute environmental sexual harassment on remand, even the existing evidence would support a finding that Mr. Taylor was on notice that his advances were unwel-

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[14] *Amicus* United States appears to be of the view that the Bank may well have had adequate notice here. (US, 30.)

[15] In cases where a single proprietor is the perpetrator, there is no one else to whom to report. Cases governing whether a relationship is employer/employee have ruled that factors that establish an employment relationship include, *inter alia,* control of the conditions of employment and maintenance of employment records. *Bonnette v. California Health and Welfare Agency,* 704 F.2d 1465, 1469-70 (9th Cir. 1983); *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973) *cert. denied,* 414 U.S. 819 (1973).

come, because he was repeatedly told that they were. It is respondent's position that no more notice was needed, although further notice was attempted, to no avail.

The Bank attempts to use the EEOC Guidelines' requirement that co-worker (lateral) sexual harassment requires employer notice to undermine the Guidelines' position that supervisor (hierarchical) sexual harassment does not require such notice. 29 C.F.R. 1604.11 (d) (App. 54a.) In the Guidelines, liability follows power. Because coercion by a supervisor is derived clearly from the employment hierarchy, and is greater than that of a co-worker, the Guidelines attach corporate liability without a notice requirement for acts of supervisors, but not of co-workers. If co-worker sexual harassment is not reported to the employer, it is not clear that it is the *job* that holds the victim hostage to the differential treatment, because the perpetrator has no more employment power than the victim does. If the conduct is reported and nothing is done, then choice of perpetrator over victim puts the employer behind the conduct in a way it already is with supervisorial acts. With an unreported supervisor's act or a reported and condoned co-worker's act, the victim is in a position to tolerate it, risk firing, or leave. Once reported, co-worker sexual harassment becomes clearly "in employment" if the employer refuses to investigate or rectify it. Actual notice in co-worker cases serves to put the employer's power behind the perpetrator, invoking clout that a *supervisor already has* over an employee *as an employee.*

The *Barnes* dictum that in sexual harassment cases, "if the consequences are rectified when discovered, the employer may be relieved of responsibility under Title

VII," *Barnes v. Costle,* 561 F.2d at 993, is twisted into its contrapositive by the Bank. (Bank, 18.) The *Barnes* court stated the obvious: employers who discover and fix the problem are not liable. It did not state, as the Bank would have it, that employers who do not discover the problem and do not fix it are not liable. Such a rule would reward employers for looking the other way "even as signs of discriminatory practice gather on the horizon." 753 F.2d at 151.

Inasmuch as nothing is yet found as to which notice should have been given, it is very odd to be considering standards of notice. *Bundy* is sought to be distinguished on this issue on the ground that the employer there, unlike here, had full knowledge of the harassment and chose not to act. (Bank, 19.) But constructive knowledge, a possibility the Bank does not mention, was inferred in *Bundy* from the fact that the harassment was "standard operating procedure." *Bundy v. Jackson,* 641 F.2d at 940. So the employer should have known about it. This determination requires a clear factual record on the flagrance and pervasiveness of the environmental harassment, if any. *See, Katz v. Dole,* 709 F.2d 251 (constructive notice inferred).

Respondent's experience suggests that a further notice requirement would place yet another gun at the head of victims. *Amicus* Boston University argues that forced reporting would enhance the goals of Title VII better than would giving the employer the incentive of potential liability for knowing what is happening in their places of work. Brief of Trustees of Boston University, *Amicus Curiae,* 14-15. It is difficult to avoid the sense that it is because employers know that this kind of discrimination is so pervasive, and the disincentives to re-

port it remain so overwhelming (because victims are damaged more by reporting than by not reporting), they do not want to be held responsible for how people are treated in their institutions. Nor should an employer be insulated by the fact of having a procedure, simply because it looks good on paper. The reality of the case at bar is that Mr. Taylor *was* the procedure, although it dignifies their policy to call it one. The perpetrator was the procedure. (*See supra* 6-7.) In light of the fact that Mr. Taylor was the Bank's procedure, according to the procedure itself, it is particularly difficult to take that the Bank seeks to hide behind the existence of its procedure while maintaining that notice to the perpetrator is not notice to the Bank. (*accord,* US, 26.)[16] This is not a situation in which there was an excellent procedure and an institutional commitment to making it work but the victim inexplicably chose not to use it. If procedures are viable and do not denigrate the victim, they will be used. Typically, too, an administrative complaint precedes suit, which provides the defendant ample opportunity to cure or settle short of liability. The available range of motion is far beyond the picture of virtual entrapment defendants and some *amici* portray.

The underlying issue here is the implicit "archaic and stereotypic notion," *Mississippi University for Wo-*

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[16] In a final turn on its notice argument, petitioner attempts to avoid liability by relying on the intent requirement under Title VII. The doctrine is misconstrued and misapplied. The Bank states it can not be liable for relief under 706(g) unless it knew of the discrimination, because otherwise it could not have intended to discriminate. (Bank, 12.) Intent goes to whether treatment is based on sex, not to employer liability. *U.S. Postal Service v. Aiken,* 460 U.S. at 715; *Musikiwamba v. Essi, Inc.,* 760 F.2d 740, 747 (7th Cir. 1983) (intent not an employer liability issue in sexual harassment cases). Courts have treated sex-

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men v. Hogan, 458 U.S. 718, 725 (1982), projected onto Ms. Vinson, that some women lie about sex for money. It is apparently feared that women subordinates will entrap unsuspecting supervisors into sexual liaisons which women want and keep secret in order to sue the company: "Plaintiffs . . . may have initiated the relationship, but . . . later allege pain and suffering." (EEAC, 19.) *See also* 760 F.2d at 1330 (App. 23a-24a). Courts should have no more difficulty distinguishing fabricated cases in this area than in any other. In *Neidhardt v. D.H. Holmes,* 21 F.E.P. 456 (E.D. La. 1979), *aff'd. mem.,* 624 F.2d 1097 (5th Cir. 1980), two women were, through application of conventional rules of evidence, found to have fabricated a sexual harassment claim.

The deeper fear seems to be that if a woman can sue for forced sex at work, there will be no voluntary sex at work, because she could always lie about it later. In this view, if women are given legal backing to decline unwanted advances, the only future will be an "entirely asexual" workplace, 760 F.2d at 1331 (App. 25a). If an employer can be sued for culturally biased acts and epithets, can cultural holidays not be celebrated or discussed? With all respect, it is difficult for respondent to believe that if forced sex is actionable, voluntary sex will become too big a risk to

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basis in sexual harassment cases as essentially facial unless answered to the contrary. Instead of inquiring whether a man who engaged in coitus 40 to 50 times with a woman workplace subordinate did so with intent to gratify himself sexually with a member of her gender, regardless of her inclinations, or whether he did so with intent to discriminate against a woman on the basis of sex, courts have approached the question as if to show the first is to show the second. *See e.g. Katz v. Dole,* 709 F.2d at 256 n.7 applying precisely the approach later enunciated in *Aiken.*

take. The contrary assumption, that only if sex can be forced with impunity, can it be had voluntarily, is perverse. Rape law poses the same issue, but it exists because rape exists. Moreover, the data suggest that at least statistically the problem is closer to the reverse: thousands of women like Ms. Vinson are sexually violated but do not complain officially in part because of the way they expect to be received. D. Russell, *Sexual Exploitation* (1984) 29-65, 269-271. Their apprehensions have not been unfounded.

IV. EVIDENCE OF DRESS AND REPORTS OF FANTASIES WAS PROPERLY EXCLUDED ON REMAND.

Mr. Taylor said no sex occurred between him and Ms. Vinson. Ms. Vinson said it did, and moreover it was forced. The judge found that if sexual intercourse occurred, Ms. Vinson's participation was voluntary.

The trial judge ruled that "if the plaintiff and Taylor did engage in an intimate or sexual relationship . . . [it] was a voluntary one by plaintiff . . . ." (App. 42a.) This is not a finding of fact, it is a proposition of logic with a condition precedent verging on a conclusion of law. It amounts to an inference of consent although defendant Taylor did not plead consent and no one put on proof of consent. This may be the reason for the lack of factual support offered for the conclusion. Yet petitioner (Bank, 28-29) and some *amici* have contended that the Court of Appeals would exclude proof defendant offers that the relationship was consensual. Mr. Taylor offered no evidence that the relationship was consensual because he took the position that the relationship was not sexual. The Bank did not offer such evidence either.

How might one know that, if a sex act which may or may not have occurred, occurred, the woman did consent to it? This is a metaphysical riddle, not a factual finding. It is nothing other than a ruling that this is a woman who *would* have wanted it, whether it happened or not. As such it is not a finding of fact, it is an assassination of character. It is a reversion to an atavism from the law of rape that "a rape accusation . . . [is] the product of a woman's over-active fantasy life or . . . [the] consequence of a woman's communication of her sexual desires, subtly or otherwise, to a hapless male." L. Letwin, *"Unchaste" Character, Ideology and the California Rape Evidence Laws,* 54 So. Cal. L. Rev. 35, 35-36 (1980). While the ruling may express the fact-finder's point of view on the plaintiff as a woman, it fails to enlighten reviewing courts on what Mr. Taylor did or did not do.

The trial judge's finding on this point led the Court of Appeals to suspect that weight may have been given to impermissible evidence, evidence admitted over plaintiff's timely objections on grounds of irrelevance. (TR, Jan. 23, 18, 23, 25) (Testimony of D. McCallum.) The Court of Appeals thus noted, in distinguishing apparently voluntary compliance within a possible context of force from the unwanted environmental harassment that may have constituted that context of force, that although the District Court gave no basis for its findings, it "may have considered the volunminous testimony regarding Vinson's dress and personal fantasies." 753 F.2d at 146 n.36 (App. 9a n.36). Such evidence was directed excluded on remand.

Petitioner (Bank, 26-30) and the dissenters in the Court of Appeals, 760 F.2d 1330 (App. 24a-25a) fervently

urge this evidence be admitted. They argue that defendants will be unjustly constrained in proving that their sexual behavior is welcome if they cannot introduce evidence of what the victim wore and what it was said the victim said she imagined. This constraint on perpetrators is not raised by this case. Mr. Taylor never sought to prove that the advances and intercourse alleged were welcome. He sought to prove that they did not occur. Ms. Vinson's dress and flights of fancy do not make them more likely to have occurred. Anyway, it was *her* contention that they *did* occur. Ms. Vinson's "sartorial and whimsical proclivities" 753 F.2d at 146 n.36 (App. 9a n.36) have equally little to do with whether Mr. Taylor assaulted her. It may put the Bank in an awkward position to have Mr. Taylor—who with Ms. Vinson is in the best position to know—argue that the sex did not occur, while the Bank seeks to argue *against both participants* both that consensual sex occurred and that it knew nothing about the whole affair. Clothing and fantasy evidence does not give probity to their position.

Neither the Bank nor the dissenting judges below offers legal support for the admissibility of this evidence. Respondent submits that there is none. To the extent analogies to rape law hold, unless the evidence was of previous consensual sex with the defendant, even evidence that the plaintiff voluntarily engaged in prior consensual sex with others would likely be inadmissible. Fed. R. Evid., Rule 412; 124 *Cong. Rec.* H 11944-11945 (daily ed., Oct. 10, 1978) and 124 *Cong. Rec.* S 18580 (daily ed., Oct. 12, 1978) (on passage of Rule 412). Such evidence is considered more prejudicial than probative. *U.S. v. Kasto,* 584 F.2d 268, 271-272 (8th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979) (federal case prior to Rule 412, prior unchastity evidence more prejudicial than probative; reasons for exceptions (at 271) not applicable here). *See also State v. Bernier,* 491 A.2d 1000, 1004 (R.I. 1985).

In the leading case of *Priest v. Rotary,* 98 F.R.D. 755 (9th Cir. 1983), even evidence of a complainant's voluntary sexual activity with others was held not "reasonably calculated to lead to the discovery of admissible evidence" Fed. R. Civ. Pro. Rule 26(b) in a sexual harassment case. If anything, consensual sex acts are arguably more probative of other consensual sex acts than are dress or fantasies. If such evidence was not even discoverable where, as there, voluntariness *was* the defense, it is certainly less than admissible here. Women simply do not volunteer to be sexually harassed by their clothing or the purported content of their voluntary conversations any more than by consenting to sex with others.

Evidence showing that a relationship truly is voluntary would clearly be admissible. Apparel and reports of phantasms about others are ***not that evidence.*** No connection whatever between Ms. Vinson's choice of dress and a reported voluntary conversation and defendant's case has been offered. These are conversations not with the assailant about imaginations which do not include him. There is no evidence in this record that he overheard or even knew about them. The single purpose of this material is to provide a pornographic image of the kind of woman plaintiff is. Any plausible legal argument for its relevancy thus reduces to a violation of Fed. R. Evid. 404(a), which provides that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . . " Sexual character is not an exception.

Nor do any of the exceptions to this rule apply here. This evidence was not offered for the purpose of impeaching plaintiff's credibility. (Fed. R. Evid. 608.) One's choice of apparel or fantasy life does not make it more likely than not that one is telling the truth about a sexual relationship. The Bank offers that testimony that the plaintiff shared an imagined reincarnation of her deceased grandfather with a co-worker is probative of whether the events of which she complains might have been fantasized. (Bank, 28.) Petitioner does not argue that plaintiff mistook a purported fantasy about her granfather for reality, nor does the testimony support such a conclusion. (*See* TR, Jan. 30, 62) (Testimony of D. McCallum.) It is unclear on what petitioners base their inference that she may have mistaken fantasies about Mr. Taylor's behavior for the reality of his sexual aggression. Even if sexual freedom and sexual force were conflated here, the evidence sought to be defended is not remotely relevant.

CONCLUSION

This is an unsual case of sexual harassment—not in that it happened, but in that Mechelle Vinson sued. Even though resistance, far less successful resistance, is not required, most women, once forced to have sex, are too humiliated and intimidated to complain. The result is that most reported cases of sexual harassment involve victims

who were able successfully to resist.[17] Unless rectified, this can mean that if a perpetrator can render a working situation sufficiently coercive to force the woman to have sex, by whatever means, he can then get away with anything, because the stigma of having had sex, i.e. the stigma *of having been injured in this way,* attaches to the victim. What was done to her is taken as testimony to her propensities, not the perpetrator's.

> "Women are first excluded from employment opportunities free of sexual extortion and then stigmatized by having the behavior that the context produced in them (that is, their survival skill), singled out as the reason they are unfit for the guarantees of equality." *MacKinnon*, 196.

This social fact has produced the vicious paradox that some of the least of sexual harassment's victims are the most likely to sue, leaving some of the most injured of women effectively outside the ambit of judicial relief. The more they are injured, the lower on the scale of human value they are regarded as being, such that finally it is not believed that they were hurt at all.

All too often, it is Black women like Ms. Vinson who have been specifically victimized by the invidious stereotype of being scandalous and lewd women, perhaps targeting them to would-be perpetrators.[18] This is not to say that this is a case of race discrimination, but rather that

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[17] Other than one common law sexual harassment case in education, *Micari v. Mann*, 481 N.Y.S.2d 967 (Sup. 1984), respondent is aware of only one other sexual harassment case in court in which a victim accuses a perpetrator of sexual harassment with a man with whom sex had been consummated. *Cummings v. Walsh Construction Co.*, 561 F. Supp. 872 (S.D. Ga. 1983).

[18] *See* generally *Continental Can v. Minnesota*, 297 N.W.2d 241, 246 (Minn. 1980) (defendant in sexual harassment case

(Continued on following page)

minority race aggravates one's vulnerability as a woman by reducing one's options and undermining one's credibility and social worth. In the context of such beliefs, beliefs which animate this case, a picture can be painted which destroys the victim's ability to complain of sexual violation, such that sex acts can be inflicted upon her and nothing will be done about it.

The Court of Appeals saw through this and remanded for conscientious development of the factual record in light of applicable law. This Court should dismiss certiorari as improvidently granted for the same reasons, permitting the remand to proceed, or, in the alternative, affirm the Court of Appeals.

Respectfully submitted,

Dated at Grover City, California this 11th day of February, 1986.

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(Continued from previous page)

"wished slavery days would return so that he could sexually train [plaintiff] and she would be his bitch.") "Follow me sometimes and see if I lie. I can be coming from eight hours on an assembly line or fourteen hours in Mrs. Halsey's kitchen. I can be all filled up that day with three hundred years of rage so that my eyes are flashing and my flesh is trembling — and the white boys in the streets, they look at me and think of sex. They look at me and that's all they think . . . Baby you could be jesus in drag—but if you're brown they're sure you're selling!" L. Hansberry, *To be Young, Gifted, and Black* (1969) at 98. Ms. Vinson's predicament suggests that while such a view may be most prevalent among white men, it is not confined to them alone. Reasons are suggested in W. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (1968) at 150.

REPLY

BRIEF

Supreme Court, U.S.
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No. 84-1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE QUESTIONS PRESENTED ARE RIPE FOR ADJUDICATION ON THE MERITS	1
A. The Employer Liability Question Is Squarely Presented	2
B. The Evidence Question Is Squarely Presented	4
C. The Legal Sufficiency Question Is Squarely Presented	6
II. RESPONDENT FAILS TO OFFER ANY REASONED THEORY OF LIABILITY FOR HER CLAIM	8
A. Respondent Wrongly Equates A Supervisor With His Employer For Notice And Liability Purposes	8
B. Respondent Would Presume Unwelcomeness As A Matter of Law	12
C. Respondent Cannot Show A Discriminatory Condition of Employment	13
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	6
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	11
Anderson v. City of Bessemer City, —— U.S. ——, 105 S.Ct. 1504 (1985)	2
Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)	10
Bigby v. United States, 188 U.S. 400 (1903)	4
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)	7
Colduvell v. Commonwealth, Unempl. Comp. Bd. of Review, 48 Pa.Cmmw. 185, 408 A.2d 1207 (1979)	10
Dennis v. Sparks, 449 U.S. 24 (1980)	4
Estelle v. Gamble, 429 U.S. 97 (1976), *reh'g denied*, 429 U.S. 1066 (1977)	7
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)	4
Land v. Dollar, 330 U.S. 731 (1947)	4
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), *reh'g denied*, 338 U.S. 840 (1949)	4
United States v. General Motors Corp., 323 U.S. 373 (1945)	5
United States v. 63.04 Acres of Land, 257 F.2d 68 (2d Cir. 1958)	8
U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983)	11
Statute:	
Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1982)	*passim*
Miscellaneous:	
F.R.App.P. 10	5, 6
F.R.Civ.P. 12	7
F.R.Civ.P. 52	2
Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604.11 (1984)	9, 12

TABLE OF AUTHORITIES—Continued

	Page
1 Larson & Larson, Employment Discrimination: Sex § 41.65 (1985)	10
Supreme Court Rule 23	6
11 Wright & Miller, Federal Practice & Procedure: Civil § 2814 (1973)	8

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---

REPLY BRIEF OF PETITIONER

Petitioner Meritor Savings Bank, FSB ("Bank")[1] submits this brief in reply to the brief of respondent Mechelle Vinson ("Vinson"). Respondent Sidney Taylor ("Taylor") has not entered an appearance in this Court.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE RIPE FOR ADJUDICATION ON THE MERITS.

Just six weeks before oral argument, Vinson for the first time claims that the record she placed before the Court of Appeals is insufficient to enable this Court to review the Court of Appeals' decision. Vinson's earlier brief opposing the Bank's petition for certiorari, where any claim of that type should have been made, is devoid of suggestion that the record might be deficient. In con-

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[1] "Bank" references include the Bank's corporate predecessor, Capital City Federal Savings and Loan Association.

trast to her latest position, her brief opposing certiorari concludes simply that the proffered questions are not so unsettled as to deserve this Court's review.

More important than the procedural irregularity and inconsistency of Vinson's latest contention is the incorrectness of the contention itself. The District Court carefully weighed two weeks of trial evidence and rendered findings that effectively addressed any Title VII claim Vinson might have had.[2] Those findings bring the questions presented into sharp focus. A remand without reaching the merits of those questions would be pointless and wasteful.

A. The Employer Liability Question Is Squarely Presented.

The Bank's liability for Taylor's alleged harassment is, on this record, a legal issue only. The District Court, after reviewing in detail the evidence Vinson offered in her attempt to prove that the Bank had notice of Taylor's alleged harassment, found that no Bank official beyond Taylor himself had been informed or otherwise placed on notice. (App. at 37a-41a.) The District Court then concluded as a legal matter that notice to Taylor should not amount to notice to the Bank. (App. at 41a.)

In her appeal of that ruling, Vinson cast the issue of Bank liability in terms of whether "the employer is responsible for the acts of sexual harassment of its agents and supervisory employees regardless of whether it did or did not authorize, knew, or should have known about the behavior." (Brief for Mechelle Vinson filed below on August 26, 1981, at 33.) In another filing with the Court of Appeals, Vinson said that her position on the

[2] Having failed to attack the District Court's findings as clearly erroneous, Vinson is bound by them. She cannot continue to argue discredited evidence. F.R.Civ.P. 52(a); *Anderson v. City of Bessemer City*, —— U.S. ——, ——, 105 S.Ct. 1504, 1511 (1985).

Bank liability issue, as briefed to that court, "does not depend on . . . [witness testimony] because her argument assumes there was no notice." (Reply to Opposition, filed below on September 23, 1981, at 2.) The Court of Appeals agreed with that casting of the issue:

> [W]e are confronted by the question . . . [w]hether Title VII imposes upon an employer without specific notice of sexual harassment by supervisory personnel responsibility for that species of discrimination. We hold that it does.

App. at 12a (footnote omitted).

Even in her papers filed with this Court, Vinson has in effect characterized the Bank liability issue as one of law. In her brief in opposition to the Bank's certiorari petition she said: "[T]here is no reason for imposing a requirement . . . to prove the employer had actual or constructive notice of the sexual misconduct on the job by its supervisory personnel." (Br.Opp. at 21.)[3] And in her merits brief to this Court she recognized that "the heart of the dispute" is whether "when a supervisor . . . sexually harasses a subordinate . . . , making her working environment sex discriminatory, the company is accountable." (Br. at 26-27.)

Vinson now suggests that the so-called "pattern and practice" evidence she offered at trial might show harassment so pervasive that the Bank could not have been ignorant of it. (Br. at 13.) However, Vinson did not offer "pattern and practice" evidence as proof of notice. *See, generally*, Brief for Mechelle Vinson filed below on August 26, 1981, at 37-41. *See* App. at 10a n.40, where, without mentioning notice or derivative employer liability, the Court of Appeals held that "pattern and practice" evidence was critical to whether Vinson's claims

[3] "Br. Opp." references are to the Brief of Respondent in Opposition to the Petition for a Writ of Certiorari. "Br." refers to the Brief of Respondent Mechelle Vinson.

were isolated and therefore not actionable. Moreover, Vinson conceded below that all her "pattern and practice" evidence did come in at trial, albeit "haphazardly" and in "disorganized fashion." (Brief for Mechelle Vinson filed below on August 26, 1981, at 38, 40.)

Vinson also argues that it is not appropriate to determine whether notice to the Bank was legally necessary until the substance of the matters that would be the subject of the notice is first resolved. (Br. at 1, 11.) Vinson offers no justification for that argument and indeed there is none: the legal question of whether a particular defendant can be held liable is often addressd even if additional factual inquiry might be needed on the merits of the underlying claim. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980), involving an alleged bribery conspiracy between private parties and a state court judge, where this Court affirmed a dismissal of the suit against the judge on immunity grounds before the liability of the private parties had been tried; *Bigby v. United States*, 188 U.S. 400 (1903), dismissing suit against the Government for an employee tort without awaiting a determination of negligence. It is particularly appropriate to consider the legal liability question here because it is "fundamental to the further conduct of the case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (quoting *Land v. Dollar*, 330 U.S. 731, 734 (1947)). *Accord, Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949).

B. The Evidence Question Is Squarely Presented.

The Court of Appeals, presumably to give the District Court guidance on remand, ruled *sua sponte* that the voluntariness of Vinson's participation in any relationship with Taylor "had no materiality whatsoever" and that evidence as to Vinson's dress while at work and her sexual fantasies "had no place in this litigation." (App. at 9a and n.36.) If it was then procedurally proper for

the Court of Appeals to make those rulings, it would be equally proper for this Court to review those rulings now. *See United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

Vinson argues (Br. at 7, 11, 40-41) that the evidence issue should not be reached because of what she describes as the hypothetical nature of the following District Court finding:

> 5. *If* the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with Capital, that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.

App. at 42a (footnote omitted; emphasis added). But the essence of a Title VII claim is discrimination "with respect to . . . terms, conditions, or privileges *of employment* . . . ." Title VII, § 703(a) (emphasis added).[4] Having found that the alleged intimacies "had nothing to do with her continued employment," the trial court had no reason to decide whether and to what extent Vinson and Taylor may have had a private sexual relationship unrelated to the job.

In noting the absence of a complete trial transcript (Br. at 4 n.1), Vinson overlooks the fact that *she* had the burden of ordering a transcript of those portions of the trial proceedings *she* deemed necessary to her appeal. F.R.App.P. 10(b).[5] When she asked the Court of Ap-

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[4] The Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1982), is cited herein as "Title VII."

[5] The partial transcript included in the record was ordered by the Bank. On February 11, 1986, long after the certified record had been filed in this Court, a non-party tendered to the Clerk what purports to be an additional partial transcript that was never before the Court of Appeals. The Bank understands that the Clerk refused to accept that material for filing and that it now stands merely

peals for leave to proceed without a transcript, she expressly represented that the issues on appeal could be adequately briefed without benefit of witness testimony. (Appellant's Response, filed below on March 24, 1981.) And in a separately filed paper, she told the Court of Appeals:

> One must keep in mind that the record is complete, except there is no trial transcript. However, the issues on appeal do not raise errors of fact. There is, furthermore, heavy reliance on the [trial] court's findings of fact as set out in its opinion, which is part of the record on appeal . . . .

(Reply to Opposition, filed below on September 23, 1981, at 1-2.) Based on her representations, the Court of Appeals granted leave to proceed without a transcript. Thus, she cannot now be heard to argue that deficiencies in the record preclude this Court's review.

C. The Legal Sufficiency Question Is Squarely Presented.

Firmly grounded in the record is the question whether, in the context of a one-to-one sexual relationship, some demonstrable job injury is a necessary element of a Title VII claim. The trial court expressly found that Vinson was not required to grant sexual favors as a condition of her employment and that any sexual relationship between Vinson and Taylor had nothing to do with employment, promotions, or related benefits. (App. at 42a.) The Court of Appeals left those findings undisturbed, ordering a remand because, in its view, the trial court failed to recognize that Vinson might also have a claim "simply for pervasive on-the-job sexual harassment . . . 'regardless of whether . . . [she] . . . lost any tangible job

lodged in the Clerk's office. Since the material has never been certified or transmitted as required by this Court's Rule 28.2 and F.R.App.P. 10, it is not part of the record in this case. References to the material in Vinson's brief before this Court are improper. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970).

benefits as a result of the discrimination.'" App. at 6a-7a, footnotes omitted (quoting *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981)).

Vinson contends that the legal sufficiency of her harassment claim should not be considered until the ordered remand has occurred. But questions of legal sufficiency are, as matters of logic and long-standing practice, routinely decided first. *See* F.R.Civ.P. 12(b); F.R.Civ.P. 12(d). Lower court rulings on the legal sufficiency of a claim are ripe for this Court's review whether or not the factual merits of the claim were fully resolved below. *E.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976), where, after a prisoner's constitutional claim for allegedly inadequate medical care was dismissed by the district court and the court of appeals reversed and remanded for trial, this Court granted certiorari and upheld the original district court dismissal.

Alternatively, Vinson argues that a remand is necessary to afford her a further opportunity to plead and prove that the case is in fact a "*quid pro quo*" case. *E.g.* Br. at 14 ("If Ms. Vinson's constructive discharge continues to be an issue on remand, this case may yet turn out to be a *quid pro quo* in which sexual compliance is exchanged for a job, in addition to an environmental case"). A complete answer to Vinson's argument flows from the District Court's unchallenged finding that any relationship between her and Taylor had nothing to do with employment, promotions, or related benefits (App. at 42a). Moreover, Vinson is procedurally barred from inserting a constructive discharge claim in the case now because her belated trial court motion to do so was denied as untimely (App. at 3a n.12), that denial was affirmed on appeal (*id.*), and no cross-petition for certiorari attacking that affirmance was filed.[6]

[6] Contrary to the implication in Vinson's brief, a remand pursuant to the Court of Appeals' judgment would not have wiped the slate clean. Since the Court of Appeals did not order a trial *de novo*,

II. RESPONDENT FAILS TO OFFER ANY REASONED THEORY OF LIABILITY FOR HER CLAIM.

Not only are the trial court's findings sufficient to shape the certiorari questions for decision on the merits, those findings also compel a decision against Bank liability.

Assuming, *arguendo*, that Vinson's harassment claim is cognizable under Title VII, the Bank cannot be liable because it had no notice of any harassment. Vinson attempts to avoid the notice issue by equating a supervisory employee with the employer itself. But her equation would effectively read the intent requirement out of the statute. Moreover, the facts affirmatively show that the Bank did not intend to discriminate.

Vinson would also read out the necessity of a finding of discrimination because she assumes the court cannot examine the voluntary nature of her acts at the workplace and she further assumes that whatever occurs at work is unwelcome. The trial court found that Vinson's involvement in any sexual activity was voluntary and unrelated to her work. That finding fully disposes of any liability theory she might have advanced.

A. Respondent Wrongly Equates A Supervisor With His Employer For Notice And Liability Purposes.

Vinson expressly concedes that Title VII contemplates direct, first-party liability as opposed to vicarious, third-

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the District Court, which initially tried the case without a jury, might have complied with the Court of Appeals' mandate simply by entering amended or supplemental findings. To the extent additional evidence might have been deemed necessary, the District Court could have re-opened the record only for the limited purpose of taking that evidence. *United States v. 63.04 Acres of Land*, 257 F.2d 68, 69 (2d Cir. 1958). *See, generally*, 11 Wright & Miller, Federal Practice & Procedure: Civil § 2814 (1973).

party liability and that tort law concepts such as *respondeat superior* are inapplicable. (Br. at 27, 33, 34.) But she contradicts herself and departs from the statute when she then says:

> [S]o long as a circumstance is work related, the supervisor is the employer and the employer is the supervisor. The employer does not become liable through the supervisor: for purposes of discrimination, the two are one. [Br. at 27.]

And, in an assertion that goes even further than the Guidelines, she says:

> To prove that employment discrimination occurred in the workplace is to prove the employer liable for it. [Br. at 33.] [7]

The claimed justification for an asserted identity between supervisor and employer is § 701(b) of Title VII which defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . *and any agent of such a person* . . . ." (Emphasis added.) But that statutory definition should not be read as a rule of derivative employer liability; it simply serves to expand the array of potential defendants to include any agent of a corporate employer as well as the corporate employer itself. Had Congress intended to impute liability grounded on agency law, it would have drafted § 703(a) of Title VII to read: "It shall be an unlawful employment practice for an employer, *whether directly or through its agent*, ..." Under the statute as actually adopted, an employer is not vicariously liable

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[7] Pertinent Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex ("Guidelines"), codified at 29 C.F.R. Part 1604.11 (1984), would impose automatic liability on an employer only in the case of a supervisor's harassment. Harassment by co-workers and non-employees would give rise to employer liability only if the employer learned of the conduct but failed to take immediate and appropriate corrective action. Guidelines, § 1604.11(c), (d), and (e).

for its supervisor's discrimination; the employer is directly liable for the related but distinct offense of condoning the discrimination. *See* 1 Larson & Larson, Employment Discrimination: Sex § 41.65(c) at 8-140 (1985).[8]

According to Vinson, the employer is absolutely accountable for all that may occur at the workplace; at the same time, the employee—even one with supervisory responsibilities—has absolutely no duty to alert her employer to any problem. The employee is thus privileged to accumulate grievances in secret preparation for suit. It may well be awkward for an employee to complain about her supervisor's sexual misconduct. Yet it is unreasonable to suggest, as Vinson does (Br. at 44-45), that a woman who files a federal lawsuit against her employer is too timid or embarrassed to invoke her employer's established grievance procedure or to raise the matter privately with her employer's designated EEO officer. *See Colduvell v. Commonwealth, Unempl. Comp. Bd. of Review*, 48 Pa.Cmmw. 185, 408 A.2d 1207 (1979) (unemployment compensation benefits denied employee who quit to escape supervisor's sexual harassment, where employee failed to follow common sense course of complaining to employer before quitting).

If environmental harassment by a supervisor is actionable under Title VII and if joinder of the corporate employer is desirable to obtain full relief, then the complainant carries the burden of showing that the corporate employer "intentionally engaged in . . . an unlawful employment practice . . . ." Title VII, § 706(g). Here, Vinson failed to prove that she complained to the Bank or that the Bank otherwise knew about and had an opportunity to stop alleged harassment. Instead, the evidence showed that the Bank *did not* intend to discriminate. For example, the Bank had a written equal employment and nondiscrimination policy, and its EEO officer, David Burton, kept regular contact with branch personnel. Despite Burton's having met with Vinson on other matters during the height of the alleged harassment, Vinson never mentioned any harassment problem to him.[9]

In urging an interpretation of Title VII that requires notice and opportunity to cure as a condition to employer liability in harassment cases, the Bank is not asking the Court to adopt an exhaustion doctrine for such cases or to impose an artificial barrier to the realization of effective remedies. The courts would remain free to invoke flexible rules for balancing the statute's remedial purpose against its intent requirement. For example, circumstantial evidence of intent would be as effective as direct evidence in appropriate cases. *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). Doctrines of constructive knowledge and estoppel come to mind where, in contrast to the facts of this case, an employer blinds itself to the obvious or fails to provide effective procedures to bypass an harassing supervisor. Such rules would promote the fundamental Title VII policy of encouraging voluntary settlements of claims (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). Should litigation nevertheless be necessary, the inquiry would focus on the central question of whether the employer intentionally discriminated. Vinson's position, if adopted, would frustrate

---

[8] Just as tort law concepts cannot be imposed on Title VII, neither can agency doctrines. *See, generally*, MacKinnon, J., concurring in *Barnes v. Costle*, 561 F.2d 983, 995-1001 (D.C. Cir. 1977). Judge MacKinnon there observed that "[a]nalysis of liability of an employer for violation of Title VII takes us beyond the common law of agency and tort . . . to the conclusion that, if liability is to be placed upon an employer, it must be because of the wording and policy of the legislation. Without the interposition of statutory law, the common law would impute no liability." *Id.* at 996-97.

[9] Vinson's novel representation to this Court (Br. at 5-6), that she complained to Burton about Taylor's harassment of two other women, is without record support and is directly contrary to the trial court's findings. App. at 38a-41a; Tr. Jan. 23, 1980, at 55, where Vinson admitted on cross-examination that she never had any discussion with Burton concerning sexual harassment.

Title VII policy and would encourage litigation of issues that are at best collateral to Title VII.

B. Respondent Would Presume Unwelcomeness As A Matter Of Law.

Assuming that sexual harassment, without more, is cognizable under Title VII, the unwelcomeness, *vel non*, of Taylor's alleged advances was an element of Vinson's *prima facie* case: "It shall be an unlawful employment practice . . . to discriminate *against* an individual . . . ." Title VII, § 703(a) (emphasis added). *See* Guidelines, § 1604.11(a), which define sexual harassment as "[u]nwelcome sexual advances." The Court of Appeals, citing the Guidelines, noted that unwelcomeness is the "touchstone" of an harassment claim. (App. at 17a n.68.)

Vinson seeks to eliminate unwelcomeness as an issue in the case. She implies (Br. at 23, 40-41) that the issue is no more than an affirmative defense that was somehow waived through Taylor's denial of any sexual activity. But, as an element of her *prima facie* case, unwelcomeness was necessarily before the court. Here it was Vinson's own testimony as to the nature and extent of her alleged relationship, coupled with other evidence of Vinson's workplace behavior offered by defense witnesses on direct and cross-examination, that led to the trial court's finding: "If the plaintiff and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one by plaintiff . . . ." No rule of law precludes a trial court from making findings unfavorable to a plaintiff based on the plaintiff's own evidence.

Alternatively, Vinson would dispose of the issue with the tautology that "[s]exual harassment *by definition* is never wanted" (Br. at 18; emphasis added). But she never explains how particular sexual activity is to be determined as harassment in the first place nor does she allow for any variation in individual sensibilities. Adoption of Vinson's argument would effectively make a

supervisor's advances toward a subordinate a *per se* violation.

Vinson's argument for excluding evidence of her own sexual behavior at work is particularly inexplicable in light of her having offered so-called "pattern and practice" evidence of Taylor's behavior toward other women. Her rationale for this latter evidence is that she had a right to show the environment she entered on accepting employment at the Bank (Br. at 19), and because it made more likely her claim that Taylor treated her offensively (Br. at 20). At the same time, however, she would bar the Bank from showing her own willing role in fostering any offensive environment and in inviting Taylor's alleged advances.

The evidence ruled improper by the Court of Appeals is relevant to questions of whether a claimant welcomed, or was offended by particular sexual advances and whether reciprocation of those advances was voluntary or coerced. By championing a rule that would preclude factual inquiry into those matters, Vinson depicts a woman who could never, *as a matter of law*, welcome sexual activity, and she depicts a woman whose uncomplaining participation in a sexual affair with a supervisor is, *as a matter of law*, invariably the product of coercion and intimidation. Such a rule would codify one of the very stereotypes Title VII was designed to eradicate.

C. Respondent Cannot Show A Discriminatory Condition of Employment.

Vinson undertakes no statutory analysis to show how the facts of this case could satisfy the elements of § 703 (a)(1) of Title VII. She ignores relevant legislative history as to the purposes of the statute.[10] And she

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[10] The history of the 1972 amendment to Title VII, referred to at Br. 33 n.12, makes clear that Congress remained committed to eradicating sex discrimination. That history does not, however, show an intent to expand the meaning of sex discrimination to cover the type of claim asserted here.

makes no attempt to explain or distinguish this Court's decisions to the effect that Title VII deals with job-related benefits and detriments. In short, Vinson does not join issue on the legal sufficiency question.

Vinson does attempt to avoid the question. Her discourse on the magnitude of the harassment problem is no substitute for a showing that she was the victim of employment discrimination or that Congress meant to regulate private, one-to-one, voluntary activity.

Vinson asks the Court to hold that Title VII prohibits "conditioning economic survival on sexual submission" (Br. at 1). No reasonable employer could except to that request. But such a holding would have no bearing on the outcome of this case. The question presented here is whether the behavior described in this record is, without more, a discriminatory condition of employment. We showed in our initial brief that it is not; Vinson gives no reasoned argument to the contrary.

CONCLUSION

For each of the foregoing reasons, and for the reasons stated in the Bank's initial brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Dated at Washington, D.C. this 14th day of March, 1986.

AMICUS CURIAE

BRIEF

MOTION FILED
DEC 11 1985

No. 84-1979

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,
Petitioner,
v.
MECHELLE VINSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Chamber of Commerce of the United States respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the petitioner herein has been obtained. Over the past several weeks numerous telephone calls were directed to respondent's counsel, Patricia J. Barry, in California and repeated messages were left stating the purpose of the telephone calls. To date, Ms. Barry has failed to return these telephone calls and the applicant is forced thereby to file this motion.

The Chamber of Commerce of the United States is a federation consisting of several thousand state and local chambers of commerce and trade and professional associations, as well as more than 180,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important employment matters before the courts, the Congress, the Executive Branch and the independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities.

The issues before the Court in this case are of major importance to Chamber members. As employers, its members are vitally concerned with their responsibilities and duties under Title VII. The Chamber and its members are dedicated to eliminating sex discrimination from the workplace. The decision from the court of appeals in this case, however, constitutes an unwarranted extension of Title VII to areas beyond the employer's control. By imposing liability on the employer for the purely personal conduct of a supervisor, of which the employer had no knowledge, and which was directly contrary to the employer's express policies, the court of appeals has placed an impossible burden on the employer. It has, in effect, imposed liability on an employer because of conditions which the employer did not create and, because it was unaware of their existence, was powerless to correct. The court of appeals' further ruling that the defendant may not introduce evidence to prove that the sexual behavior was voluntarily engaged in by the plaintiff, or that the plaintiff in fact solicited sexual advances of which she complained, effectively deprived the employer of any defense. Any "sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employees sees fit, after the fact, to so characterize it." *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir.), *reh'g denied en banc*, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J. dissenting). The Chamber agrees with Judge Bork that "[t]hese rulings seem plainly wrong." *Id.* Therefore, the Chamber believes that the judgment of the court of appeals should be reversed.

WHEREFORE, applicant respectfully requests that it be permitted to file its amicus curiae brief in this action.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. ALLEGATIONS THAT AN INDIVIDUAL SUPERVISORY MALE EMPLOYEE MADE SEXUAL ADVANCES TOWARD AN INDIVIDUAL SUBORDINATE FEMALE EMPLOYEE, WITHOUT ANY LOSS OR THREATENED LOSS OF TANGIBLE JOB BENEFITS, DO NOT STATE A CLAIM OF EMPLOYMENT DISCRIMINATION BECAUSE OF SEX IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED	4
II. AN EMPLOYER SHOULD NOT BE STRICTLY LIABLE UNDER TITLE VII FOR A SUPERVISOR'S SEXUAL ADVANCES WHERE THE EMPLOYER NEITHER KNEW NOR REASONABLY COULD HAVE KNOWN OF THE SEXUAL ADVANCES	13
A. Substantive Differences Between Sexual Harassment and Traditional Non-tort Discrimination Claims Require a Knowledge Standard	13
B. A Knowledge Standard Is Necessary to Establish the Intent Requirement of Title VII	16
C. A Knowledge Standard Is Necessary on Both Fairness and Policy Grounds	17

TABLE OF CONTENTS—Continued

	Page
III. EVIDENCE THAT THE PLAINTIFF INVITED AND WELCOMED HER SUPERVISOR'S SEXUAL ADVANCES AND THEREFORE VOLUNTARILY ENGAGED IN WORKPLACE SEXUAL CONDUCT IS CLEARLY ADMISSIBLE IN DEFENSE OF TITLE VII CLAIMS	19
IV. THE COURT SHOULD ESTABLISH GUIDELINES FOR ANALYSIS OF SEXUAL HARASSMENT CASES	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	11
Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)	*passim*
Barnes v. Train, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), rev'd sub nom. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977)	7
Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984)	18, 27
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)	*passim*
Calcote v. Texas Educational Foundation, Inc., 458 F. Supp. 231 (W.D. Tex. 1976)	26
Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977)	10
Carroll v. Talman Federal Savings and Loan Association, 604 F.2d 1028 (7th Cir. 1979)	10
Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976)	10
Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161 (D.C. Ariz. 1975), *vacated and rem*, 562 F.2d 55 (9th Cir. 1977)	7
Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983)	14, 17
Evans v. National Post Office Mail Handlers Union, 32 Fair Empl. Prac. Cas. (BNA) 634 (D.D.C. 1983)	23
Ferguson v. E.I. DuPont de Nemours and Company, Inc., 560 F. Supp. 1172 (D. Del. 1983)	15
Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977)	10
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978)	16
Gan v. Kepro Circuit Systems, 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mont. 1982)	22
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	11, 12
Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976)	10

TABLE OF AUTHORITIES—Continued

	Page
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)	4, 14, 26, 27
Harrington v. Vandalia-Butler Board of Educ., 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979)	10
Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985)	14
International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977)	16
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	passim
Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480 (E.D. Wis. 1979)	14
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)	13
Meyers v. ITT Diversified Credit Corp., 527 F. Supp. 1064 (E.D. Mont. 1981)	14
Munford v. James T. Barnes and Company, 441 F. Supp. 459 (E.D. Mich. 1977)	14
Neidhardt v. D. H. Holmes Co., 21 Fair Empl. Prac. Cas. (BNA) 452 (E.D. La. 1979)	14
Phillips v. Martin-Marietta Corporation, 400 U.S. 542 (1971)	7
Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)	8, 9
Steadman v. Hundley, 421 F. Supp. 53 (N.D. Ill. 1976)	10
Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976)	10
Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981)	16
Tomkins v. Public Service Electric and Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd* 568 F.2d 1044 (3d Cir. 1977)	7
Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044 (3d Cir. 1977)	14, 17
Trans World Airlines v. Hardison, 432 U.S. 63 (1977)	12
United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978)	10

TABLE OF AUTHORITIES—Continued

	Page
U.S. Postal Services Board of Governors v. Aikens, 460 U.S. 711 (1983)	16
Vinson v. Taylor, 753 F.2d 141 (D.C. Cir.), *reh'g denied en banc*, 760 F.2d 1330 (D.C. Cir. 1985)	passim
Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir.), *cert. denied*, 433 U.S. 915 (1977)	10
Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd sub nom Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978)	6
STATUTES	
42 U.S.C. §§ 2000e-2000e-17 (1982)	2
42 U.S.C. § 2000e-2(a)(1) (1982)	5
42 U.S.C. § 2000e-5(g) (1982)	16
MISCELLANEOUS	
110 Cong. Rec. 2577 (February 8, 1964)	5
29 C.F.R. § 1604.11(a)	10, 22
29 C.F.R. § 1604.11(b)	21, 26
29 C.F.R. § 1604.11(f)	17
EEOC Decs. No. 84-1 (November 28, 1983), EEOC Decisions (CCH) ¶ 6839 (1983)	23
EEOC Memorandum Regarding Commission Participation as Amicus Curiae in PSFS Savings Bank, FSB v. Vinson, 210 Daily Labor Rep. (BNA) E-1 (Oct. 30, 1985)	15

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---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Supreme Court Rule 36.3. A motion for leave to file this brief has been filed with the Court.

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber of Commerce of the United States is fully set forth in the attached Motion for Leave to File Amicus Curiae Brief.

SUMMARY OF ARGUMENT

Allegations that an individual supervisory male employee made sexual advances toward an individual subordinate female employee, without any loss or threatened loss of tangible job benefits, do not state a claim of employment discrimination because of sex in violation of Title VII of the Civil Rights Act of 1964 as amended. 42 U.S.C. §§ 2000(e)-2000e-17. There is nothing in the express language or the statutory history of Title VII which supports the proposition that individualized sexual harassment of the type alleged in this case was intended to be covered. While harassment of a sexual nature directed against employees of a particular sex may, if so pervasive as to permeate the workplace, violate Title VII, individualized sexual advances are not covered, especially where the employer did not know of their existence. The courts of appeals which have held that individualized sexual harassment constitutes a violation of Title VII have ignored the important distinctions between sexual desire and gender-based discrimination. They imposed liability not because the employer intended to discriminate, or because an employer's policy had a discriminatory effect, but simply because the sexual advance occurred at the workplace.

Assuming that individualized sexual conduct can violate Title VII, absolute liability against an employer for a supervisor's conduct finds no support on legal or equitable grounds. An absolute liability standard, woodenly applied without any judicial inquiry as to employer knowledge or failure to rectify, ignores the congressional requirement embodied in Title VII of intent on the part of an employer before a violation of the Act can be found.

Fairness to both employer and employee is best served by the requirement of a knowledge standard. Prevention of sexually offensive conduct in the workplace is more

likely when an employer maintains and enforces a policy against such behavior and acts immediately to investigate and take appropriate action if in fact such behavior occurs. A requirement that an employee at least notify the employer of the problem, before going to court, is not an onerous one. Usually, the problem will be rectified immediately. If it is not, the employee may still seek relief under Title VII.

The court of appeals also announced evidentiary rules which have no basis in law. The court redefined the issue of sexual harassment to incorporate an irrebutable presumption that sexual advances are *per se* unlawful sex discrimination. Based upon this presumption, the court ruled that evidence as to the context of the alleged advances is inadmissable.

These evidentiary rulings ignore the realities of the workplace. Further, they contradict the recognition by the same court that personal relationships are not matters of concern under Title VII. Also, such a presumption of sex discrimination ignores the requirement in sexual harassment cases that an advance be unwelcome. It further ignores the subjective factors of the charge and removes any opportunity an employer may otherwise have to present its side of the story.

The Chamber further suggests that the Court should outline the order of proof appropriate in cases such as this. The Chamber has submitted at the close of its brief what it believes to be the proper allocation of proof.

ARGUMENT

I. ALLEGATIONS THAT AN INDIVIDUAL SUPERVISORY MALE EMPLOYEE MADE SEXUAL ADVANCES TOWARD AN INDIVIDUAL SUBORDINATE FEMALE EMPLOYEE, WITHOUT ANY LOSS OR THREATENED LOSS OF TANGIBLE JOB BENEFITS, DO NOT STATE A CLAIM OF EMPLOYMENT DISCRIMINATION BECAUSE OF SEX IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

A proper treatment of this case requires an initial determination of whether sexual advances made by an individual supervisor toward a single subordinate employee, without more, constitute a violation of Title VII. In addressing this question, it should be noted that sexual harassment cases have traditionally been held to fall into two categories: cases alleging that a supervisor demands sexual consideration in exchange for job benefits ("quid pro quo") and those cases alleging harassment through an "offensive environment" or "condition of work." *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982). The court of appeals in this case found that "Vinson's grievance was clearly of the latter type." *Vinson v. Taylor*, 753 F.2d 141, 145 (D.C. Cir.) *reh'g denied en banc*, 760 F.2d 1330 (D.C. Cir. 1985). Thus, the issue of whether an employer violates Title VII of the Act if the employee's supervisor demands sexual consideration from an employee in exchange for job benefits is not before the Court. What is at issue is whether Title VII was intended to render an employer liable for the purely personal conduct of the supervisor toward an individual employee where no loss or threatened loss of tangible benefits is involved.

The court of appeals' opinion that such conduct does violate Title VII, finds no support in either the statutory language or legislative history. The pertinent language of Title VII provides as follows:

> It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1).

From a literal reading of the provision, it appears that Congress intended to protect individuals from unequal treatment in their workplace in the concrete and identifiable areas of hiring, termination, wages and conditions of employment.

Title VII does not contain an express provision concerning sexual harassment, nor does it define sexual harassment as sex discrimination. The prohibition against sex discrimination was added by a floor amendment submitted by Rep. Smith with little debate, just prior to enactment. 110 Cong. Rec. 2577 (1964). Rep. Smith was opposed to Title VII and his amendment was apparently an attempt to undermine the legislation and, presumably, to prevent its passage. The debate on the amendment was extremely limited. Rep. Smith merely stated:

> I think we all recognize that it is undisputable fact that all throughout industry women are discriminated against in that they just generally speaking 'they do not get as *high compensation* for their work as do the majority sex. Now, if that is true, I hope that the committee chairman will accept this amendment.

110 Cong. Rec. 2577 (February 8, 1964). (emphasis added).

Nowhere in the debate was there an allusion that Title VII was intended to govern the sexual mores of employees. There is simply no indication that Congress intended to make the federal courts the arbiters of good taste in the workplace.

The notion that sexual harassment would be encompassed under Title VII did not come until relatively late in its development. *See, e.g., Williams v. Saxbe,* 413 F. Supp. 654 (D.D.C. 1976), *rev'd sub nom. Williams v. Bell,* 587 F.2d 1240 (D.C. Cir. 1978). These cases were in large part *quid pro quo* cases. It was not until 16 years after passage of the Act that a court held that an employer could be liable for sexual advances made by a supervisor toward his subordinate employee without any loss or threatened loss of tangible job benefits to the employee. *Bundy v. Jackson,* 641 F.2d 934, 943-46 (D.C. Cir. 1981). Although other courts have since followed *Bundy,* no court has satisfactorily explained why this is so, and this Court has not addressed the difficult question of whether sexual advances constitute discrimination. As Judge Bork stated in his dissent from the *en banc* decision in this case:

> Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as "discrimination." Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. The artificiality of the approach we have taken appears from the decisions in this Circuit. It is "discrimination" if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does *not* prohibit sexual harassment by a "bisexual superior [because] the insistence of sexual favors would . . . apply to male and female employees alike." . . . That bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.

Vinson v. Taylor, 760 F.2d at 1333 n.7 (citations omitted, emphasis in original).

The notion that sexual advances constituted discrimination initially met with resistance in the district courts. *See, e.g., Corne v. Bausch and Lomb, Inc.,* 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and remanded,* 562 F.2d 55 (9th Cir. 1977) (sexual advances in this context were "personal proclivit[ies], pecularit[ies] or mannerisms," having no relationship whatsoever with the particular employer); *Barnes v. Train,* 13 Fair Empl. Prac. Cas. 123, 124 (D.D.C. 1974), *rev'd sub nom. Barnes v. Costle,* 561 F.2d 983 (D.C. Cir. 1977) ("[t]he substance of plaintiff's complaint was that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."); *Tomkins v. Public Service Electric and Gas Co.,* 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd,* 568 F.2d 1044 (3d Cir. 1977) ("[w]hile sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.")

The courts of appeals have thus far rejected such arguments, usually on the theory that "but for" the employee's particular sex, the advances would not have been made. *Barnes v. Costle,* 561 F.2d at 990. Such an oversimplified rationale, however, ignores the distinction between individualized sexual conduct and gender-based discrimination. The court in *Barnes* relied on *Phillips v. Martin-Marietta Corporation,* 400 U.S. 542, 544 (1971), where the Court held that a company's refusal of employment to mothers but not to fathers of pre-school-age children was *prima facie* sex discrimination. Such reliance is misplaced. While *Martin-Marietta* does stand for the proposition that liability can be imposed where gender is a criterion in the determination of employability, it differs in two important respects from the instant case. First, *Martin-Marietta,* and other cases cited by the court in *Barnes,* 561 F.2d at 991, dealt with employment policies, rather than individual conduct. The policies found to be illegal were of a kind

which promoted sex stereotyping, or could be used as a ruse to exclude women from the workplace. Such cases are in stark contrast to the situation presented here, where the alleged sexual advances were not part of a company policy or practice (indeed such advances were contrary to company policy), and did not have either the intent or effect of stereotyping women or other minorities. Thus, the "but for" analysis is inappropriate.

This is especially so in a case such as this, where the alleged advances were not accompanied by a threatened loss of any tangible job benefits. No one would quarrel with the proposition that, in the appropriate factual setting, a supervisor who deprecates a woman's capacity to work, because she is a woman, might violate the Act. Neither would one dispute the contention that a claim arises where, again under appropriate circumstances, a female employee is subjected to inordinate sexual language in an effort to drive her from her job. Nor would one argue that sexual advances which were "standard operating procedure," as in *Bundy*, 641 F.2d at 939, would not fall within the ambit of Title VII. In all such situations, the intent of the employer to treat women differently can be readily discerned. But conduct of the type alleged in this case is an entirely different matter. By its very nature, it is conduct not intended by the employer, but rather conduct engaged in without the employer's knowledge or consent. The employer is in no way involved in the conduct. Indeed, as is the case here, most employers strongly disapprove of the conduct and will take actions to stop it when brought to their attention.

Barnes, of course, was a *quid pro quo* case. *Bundy*, which constitutes the underpinnings of the instant case, strained to place the label of working conditions on the private conduct of supervisors and employees by focusing on the purely psychological aspects of the workplace environment. In doing so, the *Bundy* court relied heavily on the opinion of Judge Goldberg in *Rogers v. EEOC*,

454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

A close reading of *Rogers* reveals, however, that even Judge Goldberg did not take as expansive a view of Title VII as the court below. *Rogers* involved the narrow question of whether the court should limit the investigative scope of the EEOC on the ground that the Commission sought evidence of a discriminatory employment practice which was not proscribed by Title VII—specifically, an allegation that minority patients were segregated by the employer. In an opinion not supported by his brethren on the panel, Judge Goldberg did write that Title VII

> is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision a working environment so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .

454 F.2d at 238.

However, contrary to the *Bundy* court's assertion that "[t]he Fifth Circuit then concluded that the employer had indeed violated Title VII," in fact, it merely granted access to the employer's records. *Id.* at 241.

Thus, even Judge Goldberg envisioned a work environment heavily charged with discrimination before liability would attach. While *Bundy* may have been correctly decided in view of the fact that sexual advances were "standard operating procedure," it does not follow that this principle should apply to individual sexual activity which is essentially unconnected with the employment. Even the cases cited by *Bundy* to support its proposition that "conditions of employment" include an employee's

psychological and emotional work environment deal either with the employer's policies or a pattern of conduct.[1]

The terms "an intimidating, hostile, or offensive working environment," EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) (1981), are highly subjective. Some persons of both sexes might find certain actions offensive which others would consider harmless. In addition, under the theory espoused by the court below,

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[1] *Carroll v. Talman Federal Savings and Loan Association*, 604 F.2d 1028, 1032-33 and n.13 (7th Cir. 1979) (employer required female employees to wear uniforms while allowing males to wear own suits); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (employer condoned segregated employee eating clubs); *Harrington v. Vandalia-Butler Board of Educ.*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (employer gave female physical education teachers inferior locker and shower facilities); *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir.), *cert. denied*, 433 U.S. 915 (1977) (whie female claimed to represent class of women, Negroes and other minority groups who were "discriminated against by this company by being hired in a low-pay and low-status work compared to men, in job assignments and promotions."); *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976) (discriminatory job assignments); *United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (class action by black police officers citing numerous incidents of racial harassment with little or no response by the police department); *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976) (class action on issue of employer's hiring practices); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (ethnic slurs directed at single individual by single employer, did not constitute a pattern of offensive ethnic slurs which would violate Title VII); *Steadman v. Hundley*, 421 F. Supp. 53 (N.D. Ill. 1976) (merely held that an allegation that three individual state employees made unfounded complaints against the plaintiff, unfairly denied him a promotion which he deserved, made racial slurs against him, and assigned him unwarranted menial tasks was sufficiently clear to withstand a motion to dismiss); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976) (manager embarked "upon a course of conduct calculated to demean an employee *before his fellows* because of the employee's professed religious views" had the effect of altering the conditions of his employment (emphasis added)).

a wholly consensual sexual relationship between a supervisor and an employee would automatically turn into a violation of Title VII, where the relationship had soured for the employee, but the supervisor's ardor continued unabated. Indeed, as will be shown, given the evidentiary rulings of the court below, the employer would be liable for even a consensual relationship, since it would be prohibited from introducing evidence to demonstrate that the sexual conduct was, in fact, solicited or welcomed by the plaintiff.

Such an analysis ignores the fact that there is no nexus between the plaintiff's employment and the complained-of conduct other than the fortuitous fact that the conduct occurred in the workplace as opposed to a grocery store or a nightclub. By applying a wooden "but for" test, the court has misplaced its focus from the proper question, which is whether or not Congress intended Title VII to apply to such personal relationships. There is, of course, not the slightest indication that Congress so intended.

The court below also relied on the EEOC guidelines to support its proposition. These guidelines interpret Title VII to prohibit conduct of a sexual nature which has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." EEOC Guidelines on Discrimination, 29 CFR § 1604.11. These guidelines carry no legal authority. As this Court has pointed out on more than one occasion, in enacting Title VII, Congress did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). While this does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent, it does mean that courts properly may accord less weight to such guidelines than to administrative regulations

which Congress declares to have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability. *General Electric Co. v. Gilbert*, 429 U.S. at 141. The guidelines are "not entitled to great weight" when they reflect a new policy unsupported by legislative history or prior judicial construction. *Trans World Airlines v. Hardison*, 432 U.S. 63, 76 n.11 (1977).

It is apparent that these guidelines should be afforded no more deference than those which the Court declined to follow in *General Electric*. Like the guidelines in *General Electric*, they are not a contemporaneous interpretation of Title VII. The guidelines in *General Electric* were promulgated eight years after the enactment of Title VII; the sexual harassment guidelines were not promulgated until 15 years after the Act was passed. As shown above, there is no legislative history to support these guidelines.

The decision of the court below improperly focuses on the sexual nature of the conduct rather than its employment aspects. In doing so, it has led to the inevitable, and erroneous, conclusion that offensive sexual conduct in the workplace violates Title VII whether or not the employer is involved. A close review of *Bundy* and the instant case demonstrates how this was done. The focus in *Bundy* was clearly on the employer. The *Bundy* court was faced with a factual finding that "the making of improper sexual advances to female employees [was] standard operating procedure, a fact of life, a normal condition of employment" of the defendant. 641 F.2d at 939. The court held that sexual harassment of this type constituted sex discrimination with respect to the "terms, conditions or privileges of employment." It stated that it drew its conclusion from other cases "where an employer created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employee lost any tangible job benefits as a result of the

discrimination." 641 F.2d at 943-44 (emphasis in original). In the instant case, the court cited the last above-quoted language, but substituted "Taylor," the supervisor, for the word "employer." Thus, the court has drifted away from its focus on environment created by the employer, and has rather focused on the actions of the supervisor. While *Bundy* might arguably be a case where a condition of employment was affected, even though no monetary loss was incurred, *Vinson* effectively eliminates the need for any condition of employment beyond the fortuitous fact that the parties happen to have the same employer. Such an extension of Title VII is improper.

II. AN EMPLOYER SHOULD NOT BE STRICTLY LIABLE UNDER TITLE VII FOR A SUPERVISOR'S SEXUAL ADVANCES WHERE THE EMPLOYER NEITHER KNEW NOR REASONABLY COULD HAVE KNOWN OF THE SEXUAL ADVANCES.

A. Substantive Differences Between Sexual Harassment and Traditional Non-tort Discrimination Claims Require a Knowledge Standard.

The court of appeals in this case erred when it imposed vicarious liability upon the bank in the absence of a finding that the bank had specific or constructive notice of the alleged harassment. Workplace conduct alleged to be sexually offensive is in a category totally separate and distinct from traditional Title VII non-tort discrimination.[2] While vicarious liability may be appropriate in some cases, sexual harassment is entitled to its own stand-

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[2] The doctrinal difficulties of meshing sexual harassment with other forms of discrimination have been noted by several courts, no liability for advances of bisexual supervisor because preference was not based on gender. *See* cases cited at pp. 6-7 above. Note also the recognition in *Bundy v. Jackson, supra*, that the "literal" *McDonnell Douglas* test (*McDonnell Douglas v. Green*, 411 U.S. 792, 802, 805 (1973), which normally governs Title VII actions, did not technically apply to sexual harassment claims brought under Title VII.

ard of liability which requires knowledge on the part of the employer before liability is imputed. In fact, most circuit and district courts favor the actual or constructive knowledge standard in sexual harassment cases. *Craig v. Y & Y Snacks Inc.*, 721 F.2d 77 (3rd Cir. 1983); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Tomkins v. Public Service Elec. and Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977). *See also Meyers v. ITT Diversified Credit Corp.*, 527 F. Supp. 1064, 1068 (E.D. Mont. 1981); *Ludington v. Sambo's Restaurants, Inc.*, 474 F. Supp. 480 (E.D. Wis. 1979); *Neidhardt v. D. H. Holmes Company*, 21 Fair Empl. Prac. Cas. 452, 468 (E.D. La. 1979); *Munford v. James T. Barnes and Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977).[3]

In *Henson v. City of Dundee*, 682 F.2d at 910, it was noted that ". . . in the work environment case the plaintiff must prove that higher management knew or should have known of the sexual harassment before the employer may be held liable." *Katz v. Dole* held that in a hostile environment case the plaintiff must demonstrate that the employer had actual or constructive notice of the environment and took no prompt and remedial action. In *Tomkins v. Public Service*, 568 F.2d at 1048-49, the Third Circuit found that "Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands . . . and the employer does not take prompt and appropriate remedial actions."

Judge MacKinnon's concurring opinion in *Barnes v. Costle* is especially illuminating in distinguishing sex harassment from other forms of discrimination. Judge MacKinnon first observed that the employer, as a re-

[3] The only circuit court which purports to follow the holding of the *Vinson* panel is the Seventh Circuit in *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985). The facts in that case indicated that the employer did in actuality have notice of the alleged sexual harassment and took no action.

sult of the often private nature of sex harassment, is not in a position to know of the harassment. He noted that "the sexual advance of a supervisor towards an employee is seldom a public matter and the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected advances ordinarily does not fall within the special ability of the employer or higher supervision to discern." 561 F.2d at 999. Second, Judge MacKinnon recognized that the employer is in no position to control the harassment as it occurs.[4] However, the employer is in a stronger position to prevent harassment from occurring through the use of policies and the provision of workable mechanisms for the prompt resolution of sexual harassment claims. Finally, he noted that conduct alleged to be sexual harassment is not always intrinsically offensive. Sexual harassment is, in that respect, fundamentally different from racial or other ethnic harassment since slurs of such a nature are always considered offensive.[5] "We are not here concerned with racial epithets or confusing union authorization

[4] Furthermore, as EEOC Commissioner Rosalie Silberman pointed out in the instant case, the supervisor's actions were outside the scope of his authority, since he did not take any adverse employment actions against the plaintiff and was engaged in a private relationship until the plaintiff opted out. R. Silberman, *EEOC Memorandum Regarding Commission Participation as Amicus Curiae in PSFS Savings Bank, FSB v. Vinson*, 210 Daily Labor Rep. (BNA) E-1 (Oct. 30, 1985). *See, e.g., Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (liability must be established through some form of *respondeat superior*); *Ferguson v. E. I. DuPont de Nemours and Company, Inc.*, 560 F. Supp. 1172 (D. Del. 1983) (supervisor's advances were outside scope of his employment). *See also Vinson v. Taylor*, 760 F.2d 1330, 1332 (D.C. Cir. 1985) (Bork, J. dissenting) ("[t]he panel's rule is at odds with traditional practice which was not to hold employers liable at all for their employees' intentional torts involving sexual escapades.")

[5] The uniqueness of sexual harassment is also apparent when one realizes that only sexual harassment is capable of the *quid pro quo* and environment distinctions. Racial or ethnic harassment have no counterpart to *quid pro quo* sexual harassment.

cards, which serve no one's interests, but with social patterns that to some extent are natural and expectable." 561 F.2d at 1001.

B. A Knowledge Standard Is Necessary to Establish the Intent Requirement of Title VII.

In disparate treatment Title VII cases, proof of discriminatory intent is essential. Section 706(g) of Title VII, 42 U.S.C. § 2000(e)-5(g) provides as follows: "If the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice . . . ." (emphasis added). *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977). While it is true that this Court, in *U.S. Postal Services Board of Governors v. Aikens*, 460 U.S. 711 (1983), held that the requisite intent could be proved by circumstantial evidence, it did not obviate or dilute the intent requirement. Although the requirement of intent may sometimes be inferred, it is impossible to imagine either actual or inferred intent on the part of an employer in a hostile environment case where (1) there has been no actual knowledge of the conduct or (2) its pervasiveness has not invoked a constructive notice standard. *See, Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981).

The Fourth Circuit in *Katz v. Dole* specifically acknowledged that the crux of the matter was the question of motive. The court noted: "Therefore, once the plaintiff proves that harassment took place, the most difficult legal question typically will concern the responsibility of the employer for that harassment." 709 F.2d at 255. While not expressly basing their holdings on the lack of employer intent, other circuit courts which require knowledge to impose liability have stressed the conduct's highly individual nature which leads to a conclusion of

no employer intent.[6] Even the court in *Barnes v. Costle* limited its holding of employer liability to factual situations where the employer knew of the harassment and failed to take appropriate action. 561 F.2d at 993. Likewise, the court of appeals in *Bundy* found the employer liable for hostile environment sexual harassment only upon a finding that the plaintiff's supervisors had full knowledge of the alleged harassment and yet made no effort to investigate.

In the instant case, the intent of the employer was to *prevent* discrimination not to encourage its commission. The focus on prevention is in accord with both the letter and spirit of the EEOC guidelines as they provide "[p]revention is the best tool for the elimination of sexual harassment." *Guidelines*, 29 C.F.R. § 1604.11(f). The bank's intent to prevent discrimination is demonstrated by its complaint procedure coupled with a policy against sex discrimination administered by a corporate EEO official. Going beyond the facts of the instant case, the intent of many employers today is made explicit by the promulgation and rigid enforcement of specific sexual harassment policies. For a court to hold liable an employer which has no knowledge of alleged sexual harassment and which demonstrated efforts to prevent such behavior would be to remove completely the requirement of intent from the Act.

C. A Knowledge Standard Is Necessary on Both Fairness and Policy Grounds.

The knowledge standard is fair to both employer and employee. The employer who acts promptly and appropriately upon receiving notice of alleged harassment will

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[6] The court in *Tomkins v. Public Services*, 568 F.2d at 1048, distinguished between "complaints alleging sexual advances of an *individual or personal nature*" and "those alleging direct employment consequences, flowing from the advances." (emphasis added). In *Craig v. Y & Y Snacks*, 721 F.2d at 81, the court noted the "distinction between *purely personal conduct* and conduct having direct employment consequences." (emphasis added).

be rewarded by the disappearance of the problem. The employee will benefit because, if the alleged harassment did in fact occur, it will have been removed from the workplace. The employer has both a moral and a business incentive to rid its workplace of sexual harassment.

If, as in *Bundy*, the complaint was not investigated and appropriately remedied, the employer would normally then be held liable for the supervisor's misconduct. The same would be true in the situation where the employee registered a complaint and the company chose to terminate the employee rather than investigate the complaint. On the other hand, if the complaint were adequately investigated no liability would attach. *See Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984).[7]

The court of appeals in this case referred to what it termed a "hideous quadrilemma" in which a victim must choose among acquiescence in the harassment, opposition to it, resignation from her job, or yielding to the harassment and thereby losing all hope of legal redress. *Vinson*, 753 F.2d at 146. It is plain, however, that any dilemma can be avoided by simply complaining to the perpetrator's superiors. It would appear that complaints concerning individualized, non-corporate behavior could be most expediently and satisfactorily resolved within the corporation as opposed to making complaints known initially to an outside third party. The employer is in the position of being able to remedy the situation if it has knowledge of it.

The panel opinion in *Vinson* points out that employer responsiveness to discrimination by supervisors "is an essential aspect of the remedial scheme embodied in Title

[7] In *Barrett*, the female employee argued that stronger disciplinary action should have been taken against a co-employee and that the investigation was in reality a sham. The Eighth Circuit disagreed finding that the defendant took immediate and appropriate corrective action to prevent the co-employee from further harassing the plaintiff.

VII." 753 F.2d at 151. Since, in order to avoid liability, the employer must show that it was willing to remedy the problem, the relief sought from the court is nothing more than what the employer would have done had a complaint been lodged. The instant case is particularly illustrative. The Bank has repeatedly stated that it would have taken action had the plaintiff complained, if the harassment actually occurred. There is nothing in the record to suggest that it would not. The plaintiff did not complain. Rather, she embarked upon a course of litigation which has already consumed seven years. If she is successful, all she will obtain is a court order requiring the employer to do exactly what it was willing to do in the first place.

Furthermore, a requirement that aggrieved individuals make their complaint known, in the absence of pervasiveness, would enable an employer to discern exactly what is and what is not considered by employees to be unwelcome and offensive behavior in the workplace. This concern assumes special significance when the highly subjective nature of sexual harassment claims is contemplated. *See Barnes v. Costle*, 561 F.2d 983, 999 (MacKinnon, J., concurring). Notice would provide convincing proof that the sexual advances were unwelcome.

III. EVIDENCE THAT THE PLAINTIFF INVITED AND WELCOMED HER SUPERVISOR'S SEXUAL ADVANCES AND THEREFORE VOLUNTARILY ENGAGED IN WORKPLACE SEXUAL CONDUCT IS CLEARLY ADMISSIBLE IN DEFENSE OF TITLE VII CLAIMS.

The evidentiary rules enunciated by the court of appeals compound the inequities of that court's substantive law rulings and virtually deprive an employer of any defense to the charge of sexual harassment. Judge Bork, in his dissent to the order denying rehearing *en banc*, summarized the impact of the decision of the three-judge panel:

> On the one hand, the panel holds that plaintiffs must be allowed to introduce evidence of their supervisor's behavior toward other employees in an effort to establish a pattern or practice of sexual harassment. On the other hand, the panel also holds that a supervisor must not be allowed to introduce similar evidence of an employee's dress or behavior in an effort to prove that any sexual advances were solicited or welcome.

760 F.2d at 1330-31 (citations omitted).

By refusing to allow any evidence of a plaintiff's own behavior, a trial court is forced to consider only the plaintiff's view of the facts. This cannot be permitted.

The court's thinking is revealed by the following statement: "A victim's 'voluntary' submission to unlawful discrimination of this sort can have no bearing on the pertinent inquiry: whether Taylor made Vinson's toleration of sexual harassment a condition of her employment." 753 F.2d at 146. The court assumes that a sexual advance is "unlawful discrimination" without regard to context. It in effect creates an irrebuttable presumption that all sexual advances are unsolicited and unwelcome. As Judge Bork stated:

> The argument succeeds only because the defendant is denied the right to prove that the "victim" is not that but a willing participant. The rules of evidence are rigged so that dalliance is automatically harassment because no one is allowed to deny it.

760 F.2d at 1330.

The rationale underlying this exclusionary rule is flawed on two separate grounds. First, the pronouncement that all sexual advances by supervisors are *per se* illegal ignores social reality and the purposes of Title VII. It has generally been recognized that sexual conduct is not the primary focus of the Act. As was stated in *Barnes v. Costle*, 561 F.2d at 1001 (MacKinnon, J., concurring):

> Sexual advances may not be intrinsically offensive, and no policy can be derived from the equal employ-

> ment opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorization cards which serve no one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.

The EEOC guidelines, at 29 C.F.R. § 1604.11(b), effectively codify this distinction wherein it is stated: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." These guidelines, from which the *Vinson* panel found support, require the analysis of all of the facts.

In light of the outcome reached by the lower court, it is peculiar that the panel actually endorsed this reading. It expressly recognized the need "to filter out personal relationships that are not products of employment-related intimidation." 753 F.2d at 150 n.68. Referring to the EEOC guidelines, the court declared that "[t]he touchstone of these criteria is that sexual advances *must be unwelcome* . . . ." *Id.* (emphasis added)

Without regard to the foregoing, the court of appeals determined that evidence of welcomeness, or voluntariness, is inadmissible. This acknowledgment that a sexual advance must be unwelcome does not conform with the court's conclusion that sexual advances by a supervisor are automatically "unlawful discrimination." Thus, a careful reading of that court's decision reveals that the rationale is inconsistent. Judge Bork found the ruling "astonishing" and without authority. In his dissent he states:

> I am not aware of anything in Title VII or the Federal Rules of Evidence that authorizes a court to suppress evidence that may be relevant to the

> presence of discriminatory intent. The panel has thus failed to perform the analysis required before relevant evidence may be excluded.

760 F.2d at 1331 n.1.

This observation also leads to the second flaw in the court of appeals' rationale. It ignores the definition of sexual harassment as it was pronounced in the very authorities upon which the *Vinson* panel relied. In *Bundy v. Jackson*, 641 F.2d at 947, the D.C. Circuit Court of Appeals regarded as persuasive the EEOC Proposed Guidelines. The court noted that the EEOC defined sexual harassment as follows:

> *Unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct constitute sexual harassment when . . . (3) such conduct has the purpose or *effect* of unreasonably interfering with an individual's work performance or creating an *intimidating, hostile, or offensive work environment.*

(citing Final Guidelines on Sexual Harassment in the Workplace, Nov. 10, 1980, 45 Fed. Reg. 74676-77 (1980), later codified at 29 C.F.R. § 1604.11(a) (emphasis added). These guidelines highlight the subjective nature of any conduct under investigation. They specifically raise the questions of (1) whether sexual advances were *unwelcome*; (2) what was the *effect* of the advance on the charging party; and (3) did that party consider the conduct intimidating, hostile, or offensive? Thus the mental impressions of the charging party are directly at issue. The defendant must be allowed to rebut factual issues present in the case against it.

A charging party's attitudes and conduct have been scrutinized by the courts because of their relevance to these subjective elements of sexual harassment. The facts in *Gan v. Kepro Circuit Systems*, 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mont. 1982) are illustrative. All of the plaintiff's sexual harassment claims were rejected

by the court as it found that the plaintiff "regularly" used crude and vulgar language and initiated sexually-oriented conversations with her male and female co-workers." 28 Fair Empl. Prac. Cas. at 640. She also frequently asked male employees about their marital sex lives and whether they engaged in extramarital sexual relationships. In addition, the plaintiff discussed intimate details of her marriage with her co-workers as well as her premarital sexual encounters with her husband. Based on the evidence, the court found that the plaintiff's conduct was voluntary and that

> the allegedly harassing conduct was substantially welcomed and encouraged by plaintiff. She actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct.

Id. at 641.

Thus, where a plaintiff's claim of sexual harassment may be defeated by her contribution to the sexually charged environment, evidence of that behavior is indeed relevant. *See also Evans v. National Post Office Mail Handlers Union*, 32 Fair Empl. Prac. Cas. (BNA) 634 (D.D.C. 1983) (charging party's sexual relationship with supervisor was entirely personal, welcome and encouraged); and EEOC Decs. No. 84-1 (November 28, 1983), EEOC Decisions (CCH) ¶ 6839 (1983) (participation in sexual conduct in the workplace indicates that the activity is not unwelcome).

Applied to the facts of this case, the exclusion of evidence of voluntariness and contribution to the environment is particularly vexing. These facts were best summarized by Judge Bork: "In this case, evidence was introduced suggesting that the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to other employees at the bank." 760 F.2d at 1331. As demonstrated above, the relevancy of this evidence is based upon the rebuttal of the charge that sexual advances were unwel-

come. Of course, the evidence is not determinative, *Id.*, but neither is it oppressive given the nature of the charges raised. The exclusion of this evidence, which is the repeal of the defense of voluntariness, truly makes certain "that to be charged is to be guilty." *Id.*

One hesitates to speculate on future developments, but the severity of the *Vinson* panel decision draws the absurd too close to reality. Under the ruling, a plaintiff is permitted to introduce any evidence tangentially related to the claim that sexual advances were made or that the workplace environment was intimidating, hostile, or offensive. Innuendo and inferences are deemed relevant. An employer, however is effectively prevented from presenting its side of the story. Any sexual advance is presumed to be intimidating, hostile and offensive solely because the charge was filed. Since the employer may not prove that the relationship was entirely consensual, there is no restraint to the use of a charge of sexual harassment for ulterior purposes. The court of appeals decision would permit an employee who merely feels uncomfortable or embarrassed by day-to-day proximity with his or her ex-lover to resign, through no fault of the supervisor or the employer, and successfully pursue an action against the employer for constructive discharge.

In summary, the determination by the panel below of what evidence may or may not be admitted is based on inconsistent reasoning and a denial of the elements underlying the claim of sexual harassment. That decision assumes that sexual advances by a supervisor are *per se* illegal sex discrimination. This assumption is reached despite the court's acknowledgment that personal relationships are different from employment-related matters encompassed by Title VII. Furthermore, the lower court ignores what courts and the EEOC recognize; i.e., that to be unlawful, the conduct must be *unwelcome*. This is a subjective requirement that demands evidence of a charging party's behavior as it relates to mental impressions.

Based upon either flaw in reasoning, the evidentiary rules established by the *Vinson* panel must be reversed.

IV. THE COURT SHOULD ESTABLISH GUIDELINES FOR ANALYSIS OF SEXUAL HARASSMENT CASES.

The Chamber believes that the following order of proof should be adopted in cases which allege "environmental" sexual harassment to be violative of Title VII.

1. The plaintiff should be required to establish that the complained-of conduct in fact occurred. *Katz v. Dole*, 709 F.2d at 256. This, of course, is normally a credibility issue.

2. The plaintiff must demonstrate that the sexual conduct was unwelcome. It is implicit in the definition of sexual harassment that the complained-of conduct be unwelcome. EEOC guidelines define "environmental" harassment as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [which have] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." *See also Katz v. Dole*, 709 F.2d at 255 (fellow employees' unwelcome and demeaning sexually-related behavior toward plaintiff creating "an intimidating, hostile [and] offensive working environment.") This, too, would normally be an issue of credibility. While the court below did not state that this element was unnecessary, its evidentiary rulings prohibiting the employer from submitting evidence on the issue has the effect of creating an irrebuttable presumption that the conduct was unwelcome. This ruling is clearly wrong. Both plaintiff and defendant should be allowed to submit all relevant evidence on the issue, consistent with the Federal Rules of Evidence.

3. The conduct complained of should be related to the plaintiff's employment in some significant degree other

than the fact that the individual involved was the plaintiff's co-employee or supervisor. Liability should not attach to individual sexually-motivated conduct. The plaintiff should be required to demonstrate that the conduct was either pervasive, addressed to the plaintiff's sex generally, or was intended to belittle, demean, or adversely affect the plaintiff's working conditions because of the plaintiff's gender.

4. The plaintiff should be required to establish that the complained-of actions are serious enough that an ordinary person under the circumstances would find them sufficiently offensive to undermine seriously a person's ability to perform his or her work. Title VII is not a clean-language Act. *Katz v. Dole*, 709 F.2d at 256. It is within our common experience that sexual conduct which would have been regarded as shocking and outrageous 25 years ago is now accepted as commonplace and routine by large segments of the population. Further, Title VII is not intended to apply to conduct which is isolated or trivial. *Id.* For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. *Henson v. City of Dundee*, 682 F.2d at 904. Whether the conduct is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined with regard to the totality of the circumstances. *Id.*; 29 C.F.R. § 1604.11(b) (1981). *See also Calcote v. Texas Educational Foundation, Inc.*, 458 F. Supp. 231 (W.D. Tex. 1976). The types of conduct which violate the statute should best be left for decision on a case-by-case basis. However, this should be done with the caveat that concepts of what constitutes socially acceptable, sexually related behavior are ever-changing.

5. Where, as here, the plaintiff seeks to hold the employer responsible for the alleged hostile environment created by the plaintiff's supervisor, the plaintiff must show that the employer knew or should have known of

the harassment in question and failed to take remedial action. *Henson v. City of Dundee*, 682 F.2d at 905; *Katz v. Dole*, 709 F.2d at 256.[8] The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment or by showing the pervasiveness of the harassment which gives rise to the inference of knowledge or constructive knowledge. *Henson v. City of Dundee*, 682 F.2d at 905, and cases cited therein. Whether exceptional circumstances can excuse a plaintiff from the requirement of placing the employer on notice is a question which should be decided on a case-by-case basis. Where the employer, as here, has in place a grievance procedure for handling such complaints, and a policy against discrimination, the plaintiff's burden in order to obviate this requirement should be a very heavy one.

6. The employer is not liable if it takes prompt remedial action after learning of the conduct. *Katz v. Dole*, 709 F.2d at 256; *Barrett v. Omaha National Bank*, 726 F.2d at 427. What constitutes "prompt remedial action" must, of course, be left to decision on a case-by-case basis. However, it should be noted that the term does not necessarily require the employer to terminate the offending supervisor. Other less drastic forms of discipline, such as warnings or reprimands, may be perfectly acceptable. *Barrett*, 726 F.2d at 427. Furthermore, the employer should not be held liable if it investigates an employee's complaint and erroneously, but in good faith, determines that the complaint is unfounded. The plaintiff is, of course, free to attempt to prove that the employer did not act on the complaint, or would not have acted had a complaint been lodged. However, in the latter case, the employee again would bear a heavy burden in establishing such a fact

[8] Of course, this requirement would not apply in situations where a proprietor, partner, or corporate officer participates personally in the complained-of conduct. *Katz v. Dole*, 709 F.2d at 255.

if the employer had a grievance procedure in place and a policy against discrimination.

The foregoing standards of proof assure that Title VII's laudatory purpose of eliminating sex discrimination in the workplace will be carried out, without subjecting employers to liability for purely personal escapades of a sexual nature which occur at the workplace without the employer's knowledge.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 84-1979

In the Supreme Court of the United States

OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,
PETITIONER,

v.

MECHELLE VINSON, et al.,
RESPONDENTS.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TRUSTEES OF BOSTON UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Interest of Amicus Curiae	1
Summary of Argument	2
Argument	4
I. Contrary to the View of the Court of Appeals, Title VII Does Not Make Absolute an Employer's Vicarious Liability for Sexual Harassment	4
II. Contrary to the View of the Court of Appeals, the Voluntariness of a Sexual Relationship Between a Supervisor and an Employee is a Material Factor in Determining Whether Sexual Harassment Has Occurred	16
Conclusion	20

TABLE OF AUTHORITIES

Cases

Barnes v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977) 4, 8

Bundy v. *Jackson*, 641 F.2d 934 (D.C. Cir. 1981) 4, 19

Corne v. *Bausch & Lomb, Inc.*, 390 F. Supp. 1961 (D. Ariz. 1975), *vacated* 562 F.2d 55 (9th Cir. 1977) 8

Ford Motor Co. v. *Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) 16

Horn v. *Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F.2d 599 (7th Cir. 1985) 11, 12

N.L.R.B. v. *Yeshiva University*, 444 U.S. 672 (1980) 15

Tomkins v. *Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1974), *rev'd* 568 F.2d 1044 (3d. Cir. 1977). 8

Vinson v. *Taylor, et al.*, 753 F.2d 141 (D.C. Cir. 1985) 5, 7, 8, 11, 15, 17, 18, 19

Vinson v. *Taylor, et al.*, 760 F.2d 1330 (D.C. Cir. 1985). 10

Page

Statutes and Regulations

42 U.S.C. §2000e..... 4, 5
29 C.F.R. §1604.11..... 6, 7, 9, 18

Miscellaneous

Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984)..... 7, 9

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INTEREST OF AMICUS CURIAE *

Trustees of Boston University (the "University") was chartered by statute of the Commonwealth of Massachusetts in 1869 as a body corporate not for profit. It operate Boston University, an institution located in Boston, Massachusetts, comprising sixteen Schools and Colleges which provide a diverse educational program for undergraduate, postgraduate, and professional students. The total full- and part-time student

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* Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk.

population of the University is now approximately 27,180; its employees in all categories, including faculty members, now number approximately 6,740.

The employment policies of Boston University, reflecting fundamental institutional values and not mere compliance with legal mandates, explicitly proscribe discrimination on the basis of race, national origin, religion, or sex. The University has developed and uses grievance procedures and other methods to implement its non-discrimination policy. The University believes that success in the effort to eliminate from the workplace all vestiges of offensive discrimination is best assured by the active cooperation of employer and employees. It also believes that an employer diligently pursuing that success should not incur liabilities as a result of offensive conduct that could have been prevented or promptly remedied without significant injury if the complaining employee had provided the essential cooperation. The decision of the Court of Appeals for the District of Columbia Circuit now under review expressly or implicitly rejects both of these views. To support its own effort to eliminate employment discrimination and to limit its liabilities fairly to circumstances it has a reasonable opportunity to affect, the University is interested in a formulation of the applicable norms different from those articulated and applied by the Court below.

Summary of Argument

In the absence of a fuller development by the Congress of discrete norms and enforcement mechanisms directed toward the elimination from the workplace of sexual harassment, the subsumption by Title VII of the Civil Rights Act of 1964 of efforts toward that end is appropriate. If the statutory scheme is to be made most efficacious for the protection of all employees by eliciting effectively the cooperation of employers, certain important distinctions between sexual harassment and other Title VII transgressions must be recognized. These distinctions call for development and clarification of the law on sexual harassment.

The holdings of the Court of Appeals for the District of Columbia Circuit in this case address the two most basic issues in relating Title VII to sexual harassment: what is the nature of the basic wrong itself and what are the conditions under which a supervisory employee who is guilty of sexual harassment should cease to be regarded as the employer's agent for the purpose of imposing vicarious liability. In this brief, argument on these issues is in reverse order, with vicarious liability being considered in Section I and the effect of the complainant's consent or voluntariness on a finding that harassment occurred being considered in Section II.

While Title VII expands the liability of an employer to include responsibility for the acts of its "agent," the statute provides no explicit guidance in the essential task of determining who is an agent. It is non-controversial that for the purpose of imposing vicarious liability there must be a basic nexus between the function of the offending employee and the victim in the workplace. It has been recognized, however, *e.g.*, by the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, that all employees are not fungible in their ability to impose vicarious liability for sexual harassment on their employer. Only those properly deemed to be "agents" of the employer are recognized by the statute as having that ability. The Commission, the courts, and the University in this brief reject the use of the common law doctrine of *respondeat superior* for the purpose of identifying an agent. The Commission and the courts have relied primarily, if not exclusively, on the possession of supervisory responsibilities as the identifying characteristic of an agent. While the University accepts such powers or responsibilities as a *prima facie* identifier of an agent, it argues that the statutory objectives are most efficiently achieved if the employer is permitted to establish that a supervisor has ceased to be an agent when he acts in violation of the employer's anti-harassment policy that has been effectively communicated to all employees and when the com-

plaining employee has given the employer no notice of the alleged wrong despite opportunity to do so without undue sacrifice of privacy or reasonable fear of retaliation. Should these circumstances be deemed inadequate to ground a full affirmative defense by the employer, they should at least serve to limit the remedy to reparation for losses occurring before notice of the wrong reasonably could be given.

The apparent holding of the Court of Appeals, that the consent of the complainant to the conduct that is alleged to constitute sexual harassment is immaterial, departs from common experience and understanding. It implicitly rejects the expressedviews of the EEOC that only sexual advances and other conduct that are "unwelcome" can constitute harassment and that a determination whether sexual harassment has occurred depends on the consideration of the totality of the circumstances and the context in which the alleged incidents occurred. The University argues here that these sound positions of the Commission should be ratified.

Argument

I. Contrary to the View of the Court of Appeals, Title VII Does Not Make Absolute an Employer's Vicarious Liability for Sexual Harassment.

The decision of the Court of Appeals below rests upon the premise, accepted in its earlier decisions[1] and used without further justification in this case, that sexual harassment, as well as gender discrimination, is a wrong cognizable under Title VII.[2] Despite awkwardness in fitting harassment into the basic concept of Title VII—discrimination in employment—and the bizarre quality of some of the suggested results,[3] the

[1] *Barnes* v. *Costle*, 561 F.2d 983 (1977); *Bundy* v. *Jackson*, 641 F.2d 934 (1981).

[2] 42 U.S.C. §2000e

[3] For example, in both *Barnes* v. *Costle* and *Bundy* v. *Jackson*, *supra*, note 1, the Court of Appeals for the District of Columbia asserted that Title VII would not protect an employee of either sex from harassment by a bisexual supervisor since no discrimination would be involved.

University urges this Court to approve the premise, thereby ratifying the virtually unanimous view of the Courts of Appeals that have considered the question. The apparent prevalence of sexual harassment, its offensiveness to women, and the lack of any basis in federal legislation, other than in Title VII, for efforts to eliminate it from the workplace combine to support the fundamental premise of the Court below.

The challenged holding in this case involves the scope of an employer's vicarious liability for sexual harassment, the available record suggesting no basis for any consideration of direct wrongdoing by the employer. In the view of the Court of Appeals, vicarious liability attaches strictly if the harasser is a supervisor, even though, hypothetically, the employer may have adopted a vigorous anti-harassment policy and implementing procedures and has no awareness of the harassment except such as may be imputed to it solely on the basis of the culpable supervisor's knowledge.[4]

The only explicit statutory basis for this extreme ascription of vicarious liability is the definition of "employer" as "a person engaged in an industry affecting commerce" with a workforce of the requisite size, and "any agent of such person. . . ."[5] A literal approach in pursuing the consequences of this statutory definition must be avoided. The very term the statute uses, "agent," warns against the reductionist conclusion that, merely because a culpable actor has supervisory responsibility over another to whom a wrong is done, their common employer should be liable. There must be an appropriate nexus between the actor and the victim in the workplace in order to warrant imposing on the employer liability for sexual harassment by a supervisor. The nature of that nexus has been considered in numerous cases, but still lacks adequate explication. In some cases, the critical issue has been framed in terms similar to those used by the Court below: may an employer be held liable if it had no actual knowledge of the

[4] In the Court's own language, ". . . Title VII imposes upon an employer without specific notice of sexual harassment by supervisory personnel responsibility for that species of discrimination. . . ." 753 F.2d 141, 147 (1985).

[5] 42 U.S.C. §2000e(b).

harassment and only such constructive knowledge as may be imputed to it on the basis of the harassing supervisor's own awareness. In other cases the issue has been stated to be whether Title VII liability necessitates the plaintiff's establishing the elements of the common law doctrine of *respondeat superior*. The University submits that neither of these approaches leads to an adequate explication of the essential issue, fully supports the policy objectives of Title VII, or efficiently serves the interests of offended employees—ultimately the goal of an employer attempting in good faith to effectuate a nondiscrimination policy.

The University does not urge that employer vicarious liability be restricted to circumstances in which the requirements of the common law doctrine of *respondeat superior* are satisfied. Such a limitation would subvert the essential effort to free the workplace of the various forms of discrimination proscribed by Title VII. To avoid that unwarranted result, without shifting to the opposite polar extreme of holding the employer liable for all wrongs committed by supervisory personnel, requires the development by the courts of a fair and functional version of *respondeat superior* keyed to the objectives of Title VII. That necessity is recognized by the EEOC in its Guidelines relating to sexual harassment which accord differential treatment to conduct by "agents and supervisory employees" on the one hand and "conduct between fellow employees" on the other.[6] Only the term "agent" is used in the statute; the other terms used in the Guidelines reflect the Commission's effort to add an interpretative gloss to the statute so as to make it a fair and efficient tool for working out the Congressional purpose of eliminating sexual harassment.

While the Commission's Guidelines group "agents" with "supervisory employees" in ascribing to the employer liability for their acts "regardless of whether the employer knew or should have known, of their occurrence,"[7] limiting the em-

[6] 29 C.F.R. §1604.11(c), (d).

[7] *Id.*, §1604.11(c).

ployer's liability for sexual harassment by "fellow employees" to instances where the employer "knows or should have known of the conduct" (and even in those circumstances recognizing a defense if the employer "can show that it took immediate and corrective action"),[8] the courts and writers have tended to deal with only two categories: supervisors who are deemed to be "agents" for purposes of imposing strict vicarious liability and fellow employees who are not such "agents."[9] While the University believes that the Commission errs in interpreting the statute as mandating strict vicarious liability of the employer, it regards as appropriate, indeed essential, the effort which the Commission has made to develop through interpretation keyed to the perceived purpose of the statute more refined standards for fixing vicarious liability. This effort fits into the statutory scheme, as the Commission's Guidelines illustrate, as an explication of the issue, who is to be deemed an "agent" for purposes of fixing vicarious liability. The University submits that the Commission's view, accepted and utilized by the Court below, does not implement most fairly and efficiently the Congressional purpose in dealing with sexual harassment.

[8] *Id.*, §1604.11(d).

[9] For example, the Court below said: "We attach considerable weight to this interpretation [the Commission's Guidelines], and we agree that treatment of supervisory personnel as 'agents' is in conformity with 'general Title VII principles.' . . . Neither the statutory language not its legislative history suggests that, as a trespass on Title VII, it should be treated any differently from transgressions arising out of racial or religious discrimination. And the caselaw in these latter areas establishes beyond cavil that 'an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel.'" 753 F.2d 141, 149 (1985).

The scholarly literature employs the same two categories, e.g., "The problem of the distribution of power is implicitly recognized in the EEOC Guidelines' treatment of vicarious liability. The Guidelines would hold an employer strictly liable when supervisory personnel harass lower level employees and would impose a standard of direct liability requiring at least constructive knowledge, when one non-supervisory employee harasses another." Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1460 (1984).

It is widely accepted, as the Court below pointed out,[10] that racial or religious discrimination by supervisors results in strict vicarious liability of the employer. Different treatment of sexual harassment, however, does not require this Court to reject broadly the developed caselaw interpreting and applying Title VII. That body of law can be left undisturbed if the gravamen of the alleged wrong in the case of sexual harassment is distinguishable from the other forms of discrimination made actionable by Title VII. The University contends that such a distinction is fully justified.

The uniqueness of sexual harassment within the universe of possible Title VII wrongs probably explains the early decisions that it was not a form of discrimination proscribed by Title VII,[11] even though gender discrimination in the allocation of employment perquisites was recognized as actionable. The current consensus among the courts on this point is both explained and justified by the urgency of the need to provide a remedy against this seemingly widespread and highly offensive conduct and by the fact that the Congress has not dealt discretely with it. The use of a single enactment as the basis for a remedy for different wrongs creates no necessity, however, that important differences among the wrongs be ignored. It is essential, therefore, to determine whether sexual harassment has features that distinguish it from other Title VII offenses and whether any distinguishing features discovered call for differential treatment in fixing liabilities and devising remedies.

Sexual harassment is distinguished by two important features, which have significant interconnections. First, there is neither an easily stated social consensus on what constitutes sexual harassment nor even the broad agreement, short of con-

[10] 753 F.2d 141, 149.

[11] *Barnes* v. *Train*, 13 Fair. Empl. Prac. Cas. 123 (D.D.C. 1974), *rev'd sub nom. Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Tomkins* v. *Public Serv. Elec. & Gas Co.*, 442 F. Supp. 553 (D. N.J. 1974), *rev'd* 568 F.2d 1044 (3d Cir. 1977); *Corne* v. *Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

sensus, that probably aids in the identification of other types or grounds of discrimination prohibited in the workplace. This feature has been recognized in the EEOC Guidelines by the provision that identifying conduct as sexual harassment requires consideration of the "totality of the circumstances" including the "context in which the alleged incidents occurred."[12] Further, defining the offense requires consideration of the fundamental question of the perspective or viewpoint from which the conduct being assessed is to be evaluated, with at least four choices being available: the perspective of the actual plaintiff or defendant or that of the hypothetical "reasonable" plaintiff or defendant.[13] No other Title VII offense, including gender discrimination, is similarly affected by this uncertainty as to its essential characteristics.

Second, and closely related to the first distinction, sexual harassment uniquely depends for its existence on the attitude of the person toward whom the conduct is directed; a willing or welcoming attitude can prevent the conduct from being deemed to be harassing. The EEOC's Guidelines make this clear in defining sexual harassment; the definition is in a sense extrapolated from the reception that the conduct receives: it must be "unwelcome."[14] Differential treatment based on race, gender or other grounds proscribed by Title VII, on the other hand, is illegal without regard to the consent or welcoming attitude of the recipient. Thus, conduct that any reasonable person would readily regard as offensive harassment if unwelcome will lose that character entirely if directed toward another person in a consensual relationship in which it is welcomed.

These two distinguishing features of sexual harassment are analytically discrete but in many contexts are interrelated.

[12] 29 C.F.R. §1604.11(b).

[13] See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, *supra*, note 9 at 1458 *et seq.*

[14] 29 C.F.R. §1604.11(a).

They do not invariably appear together. There can be an indeterminacy, an ambiguity, about conduct that another regards as harassing, even though the circumstances provide no basis whatever for a belief that the latter consented to the conduct or voluntarily entered the relationship in which it occurred. The basic problem of characterization is made much more complex and difficult when, as will be pointed out in Section II of the Argument, evidence of voluntariness or consent to the contextual relation between the complaining employee and the supervisor is present. One aspect of this increased difficulty involves the possibility that a subtle breakdown of, or alteration in that relationship may transform conduct that was originally not a Title VII offense, because then "welcomed," into an actionable wrong.

Do these distinguishing features of sexual harassment justify treating it differently from other Title VII transgressions? The University submits that they do for the following reasons: (1) the indeterminacy or ambiguity of the concept itself severely limits the ability of an employer through selection, training, and monitoring of supervisory personnel to *prevent*, rather than subject to *post-hoc* remediation, conduct that some employees, even those guided by an objective standard of reasonableness, might find offensive; (2) the possibility of shifting characterizations of conduct, dependent upon the granting or withdrawal of consent by the employee, calls for a more rigorous and discriminating assessment of the conduct of the employer or supervisor than may be essential when other Title VII offenses are charged; and (3) Title VII should not be interpreted to impose on an employer the unavoidable role and attendant liabilities of an insurer that "all relationships between supervisors and employees are entirely asexual."[15]

If the distinctive features of sexual harassment warrant its being treated differently from other Title VII transgressions,

[15] Judge Bork dissenting from the Court of Appeal's denial of a rehearing *en banc*, 760 F.2d 1330, 1331 (1985).

the next relevant question concerns the conditions under which an employer properly may be held liable vicariously for the harassment committed by one of its supervisors or, in the language of the statute, under what conditions is it justifiable to cease regarding a harassing supervisor as an "agent" for the purpose of ascribing to his employer strict vicarious responsibility. On this issue, the Court of Appeals in this case offered no guidance beyond the conclusion that confining liability to circumstances in which the common law doctrine of *respondeat superior* was satisfied would unduly limit achievement of the clear purpose of Title VII[16] and that "a requirement of knowledge by the employer of Title VII transgressions by supervisory personnel would effectively eliminate vicarious Title VII responsibility altogether."[17] With the first of these propositions the University agrees; the second seems clearly wrong, as the University will argue.

The most fully stated justification for imposing on an employer absolute responsibility for Title VII infractions by supervisory personnel has been provided by the Court of Appeals for the Seventh Circuit in *Horn* v. *Duke Homes, Division of Windsor Mobile Homes, Inc.*[18] Although the facts in *Horn* permit it to be regarded as both a *"quid pro quo"* and a "hostile environment" case, that distinction does not appear to be significant in the Court's analysis and will not be utilized here. Assessment of the analysis provided in *Horn* to support absolute vicarious liability of an employer may be useful in determining on a general basis the approach that most fully and fairly protects Title VII values and the legitimate interests of all employees, as well as the interests of employers.

The *Horn* analysis may be presented in a cumulative series of propositions:

[16] 753 F.2d 141, 151.
[17] *Id.*, 151-52.
[18] 755 F.2d 599, (7th Cir. 1985).

(1) protection against sexual harassment is provided by Title VII;

(2) actual or constructive knowledge of a supervisor's conduct and failure to take remedial action are not elements of the employee's cause of action;

(3) the equation of employer and agent is justified since the employer is "a legal form" that can act only through its agents;

(4) imposing liability on the employer for acts of its agents who have supervisory power is a justified risk allocation between an employee and an employer which, as the more efficient cost avoider, should bear all the required costs of doing business;

(5) strict employer liability best ensures the eradication of sex discrimination since it creates an incentive for the employer to take the most extreme care to prevent the hiring and retention of sexist supervisors;

(6) in this context the legitimate limiting effect of the *respondeat superior* doctrine is exhausted by requiring a showing, not that the discriminatory conduct was "authorized" by the employer, but that the conduct was "caused by the exercise of this supervisory power."[19]

The justification for vicarious employer liability resulting from this rationale takes no account of such factors as the employer's anti-discrimination policies or their implementing procedures; nor does it regard as relevant demonstrable non-cooperation of the complaining employee with the employer's effort. Most importantly, the asserted optimal effect of absolute liability in eradicating sex discrimination is, in the University's view, counter-intuitive and unsupported by any evidence.

The University's view on the appropriate assignment of responsibility and ultimately liability for sexual harassment requires a sharp and consistent distinction between what an employee must show in order to establish *prima facie* a cause

[19] *Id.*, 605

of action, and what an employer should be permitted to introduce in order to ground an effective defense. If attention is limited to the elements of an employee's Title VII cause of action for sexual harassment, there are persuasive reasons for accepting the views of most of the Courts of Appeals that have ruled on the matter: an employee should not be required to plead and prove that the employer knew about the offending conduct of the supervisor, that it was in accordance with the employer's policy and its authorization to the supervisor, or that the employee, before suing, had exhausted all in-house remedies the employer had provided. In short, neither the employer's knowledge nor the employee's effort to secure a private remedy should be deemed to be jurisdictional or part of the employee's *prima facie* cause of action. Nevertheless, the employer should have available an affirmative defense grounded upon the following elements:

(1) that the employer had articulated and effectively communicated to its employees a firm anti-discrimination policy that dealt explicitly with sexual harassment;

(2) that the employer, to implement its policy, had provided opportunities for employees to report perceived harassment through channels adequate for appropriate investigation with reasonable protection of the employee's privacy and her right to be free from retaliation;

(3) that sufficient steps had been taken to inform employees of the policy and the grievance procedures;

(4) that the employee had not reported the alleged discrimination; and

(5) that the employer had no actual knowledge of the harassment or any imputed knowledge based on the awareness of non-culpable agents.

In response to such evidence from the employer, the employee should have an opportunity to offer contrary evidence on all elements as well as to demonstrate that her failure to make

known her complaint was for some reason excusable. If the facts are found in accordance with the showing by the employer, the guilty supervisor justifiably would be deemed to have ceased to be the defendant employer's "agent" for the purpose of imposing vicarious liability. It should be noted, however, that the culpable supervisor would remain an agent and therefore an "employer" for the purpose of sanctioning his own direct wrongdoing.

The University submits that all of the elements of this affirmative defense are reasonably related to a responsible assignment of vicarious liability for Title VII infractions, that recognition of the defense would not conflict with the statute, would not unduly limit protection against sexual harassment, and, most importantly, would most effectively further the objectives of Title VII.

The University will support no argument that would compromise the anti-discrimination impact of Title VII. It believes, however, that among the legitimate interests meriting consideration in the interpretation and application of Title VII are those of employers who make a vigorous, good faith effort to achieve the statutory objectives and who need the active cooperation of all their employees, supervisors and others, in the effort. Recognition that an affirmative defense to a Title VII suit depends in part upon a showing that the complaining employee did not cooperate with the employer's efforts by reporting sexual harassment should provide to the employee an incentive to cooperate. It is fair and sensible to require the plaintiff to show cause why she never complained: fair, because without the knowledge she could provide, the employer cannot remedy the wrong; sensible, because she, in the circumstances, is the better risk or loss avoider. Further, and contrary to the assumption made below, the employer's own efforts should be more effectively stimulated by the recognition of a defense that depends in large measure on the vigor of the employer's anti-harassment policy and the diligence of its effort to eradicate

the evil. The imposition of strict liability, in total disregard of the employer's efforts, presents the risk, particularly in larger enterprises where foreknowledge and full control of supervisors' conduct are difficult or impossible, of draining employer incentive to create effective policies, as well as to train, monitor and investigate.

The University's argument here embraces all employers that can establish the elements of the affirmative defense. It seems appropriate to point out, however, that the holding of the Court below poses unusual hazards for most institutions of higher education. If the imposition of absolute vicarious liability can result, not merely from the conduct of supervisors in the strict sense, but also from the conduct of any employee capable of exerting "a significant degree of influence in vital job decisions," as the Court below declared,[20] then a mature college or university is at risk with respect to the conduct of its true supervisors as well as all of its faculty.[21] Yet the relatively decentralized organization of most colleges and universities, their collegial modes of governance, and the typically protected freedoms of faculties make extremely difficult or impossible the control by the institution of all conduct that presents the risk of being regarded as harassing. These realities of the "workplace" make especially important in the context of higher education the most sensitive consideration of the interests of employees and employer, guided by the overarching standard of the effectiveness of a particular norm in achieving the statutory objective of eliminating discrimination.

If this Court determines that establishing the elements of the defense here proposed should not deprive a culpable supervisor of his status as the employer's agent for the purpose of fixing vicarious liability, a more limited consequence of the showing should be recognized at the remedial level. Any losses that the complaining employee suffered after she had a reasonable and

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[20] 753 F.2d 141, 149-50.

[21] *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980).

unused opportunity to notify her employer of the harassment should be deemed to be avoidable and therefore beyond the scope of an appropriate remedy, other than against the sexual harasser. This Court already has limited a Title VII remedy to losses that cannot be mitigated.[22] An employee who has not taken even the minimal step of notifying her employer of harassment she believes she has experienced and by so failing has deprived the employer of an opportunity to redress the wrong should not be entitled to recover from it losses occurring after she had a reasonable opportunity to initiate a process that offered assurances that the injury would not be permitted to continue.

II. Contrary to the View of the Court of Appeals, the Voluntariness of a Sexual Relation Between a Supervisor and an Employee is a Material Factor in Determining Whether Sexual Harassment Has Occurred.

The record of the proceedings below presents disturbing ambiguities in both factual findings and holdings on the law with respect to the significance of the voluntary character of a sexual relation between a complaining employee and the supervisor charged with harassment. After hearing conflicting evidence concerning the conduct of the supervisor and his relation with the respondent ("Vinson"), the District Court made three findings that deal, expressly or implicitly, with the existence and character of any sexual aspect of that relation:

> "3. [Vinson's] promotions were based on merit alone; her promotions and advancements with [Meritor] did not result from her rendering sexual favors....
>
> "4. [Vinson] was not required to grant [the supervisor]... sexual favors as a condition of either her employment or in order to obtain promotion.

[22] *Ford Motor Co.* v. *Equal Employment Opportunity Commission*, 458 U.S. 219 (1982).

> "5. If [Vinson] and [the supervisor] did engage in an intimate or sexual relationship during the time of [Vinson's] employment with [Meritor], that relationship was a voluntary one by [Vinson] having nothing to do with her continued employment or her advancement or promotions....))[23]

The opinion of the District Court provides analysis of neither the concept of voluntariness used nor the significance of the voluntary character of a sexual relation in a determination whether sexual harassment has occurred.

The reasoning of the Court of Appeals on the significance of voluntariness of the sexual relation, though more fully articulated than that of the District Court, still shows critical ambiguities. The Court first characterized Vinson's cause of action as illustrative of a so-called "hostile environment" claim rather than one of the *"quid pro quo"* variety, indicating that the District Court erred in making no determination whether petitioner had "created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination."[24] With so little of the evidentiary record now before this Court, it appears impossible to determine whether the District Court merely failed to make a finding on a material matter or made an erroneous finding. Had the Court of Appeals reversed merely to enable the District Court to make a needed finding, this Court most appropriately would have deferred its own consideration, and the interest of the University would not have been implicated.

The Court of Appeals, however, indicated its own uncertainty as to the meaning of the District Court's finding that Vinson's sexual liaison with Meritor's supervisor, if any existed, was voluntary. It assumed as a possible meaning of the

[23] Appendix to Petition for a Writ of Certiorari, p. 42a.

[24] 753 F.2d 141, 144-45.

finding that "because the relationship was voluntary, there was no sexual harassment," even of the "hostile environment" type. Responding to that assumed meaning of the finding, the Court declared: "If, however, the evidence warranted a finding of sexual harassment by that standard, Vinson's 'voluntari[ness]' had no materiality whatsoever."[25]

The University must confess complete uncertainty as to the meaning and impact of these expressions of view by the Court of Appeals. Their ambiguity casts critical doubt on the scope and content of the basic concept of sexual harassment and makes urgent the clarification by this Court of the law.

A common language approach to the meaning of harassment surely would suggest conduct that is offensive, unwanted, and beyond the range of consent. This view is reflected in the Guidelines issued by the EEOC which define sexual harassment in terms of conduct that is "unwelcome."[26] If the word "voluntary" in its various forms is given its common meaning, it is impossible to comprehend how a relationship *voluntarily* entered or conduct of another to which one has *voluntarily* submitted could appropriately be regarded as harassment, even if the expansive and highly protective EEOC Guidelines are given the fullest effect.

A sexual relationship voluntarily entered between a supervisor and an employee might be manifested in the workplace by conduct of the supervisor that the employee did not welcome but found denigrating and harassing. At the same time, one should recognize the hazards of imposing vicarious liability on an employer for conduct of one of its supervisors that finds its immediate context in a sexual relationship to which the offended employee has consented. No employer can regard as fair the potential of liability resulting from expressions of such a voluntary sexual relationship that has deteriorated into alienation; nor are the courts likely to welcome the role of

[25] *Id.*, 146.
[26] 29 C.F.R. §1604.11(a).

champion of the disappointed or aggrieved party after a truly consensual relationship has foundered. At this time, the University is not prepared to argue that the voluntary nature of an underlying sexual relationship between a supervisor and an employee fully and in all cases immunizes from characterization as sexual harassment all treatment of that employee by that supervisor. The University does argue, however, that *voluntariness is a material datum*, that the EEOC and the trial court must consider proferred evidence relevant to it, and that the voluntary character of any sexual relationship found between the supervisor and the employee should subject to the most rigorous scrutiny any claim that that relationship involved harassment.

In support of its stated view that the voluntariness of Vinson was not material, the Circuit Court relied on its holding in *Bundy* v. *Jackson* that "a woman employee need not prove resistance to sexual overtures in order to establish a Title VII claim of sexual harassment."[27] The Court declared in this case that it is "hardly a major step" beyond the *Bundy* holding to recognize that "a victim's capitulation to on the job sexual advances cannot work a forfeiture of her opportunity for redress."[28] With neither of the Court's propositions would the University differ, but neither seems relevant to the issue now at hand: whether *actual mutual voluntariness* of a sexual relationship, if determined by a court to exist, prevents its manifestations from being deemed harassing. Indeed, the Court's use of such a term as "capitulation" suggests its own implicit premise that the employee's submission to advances was *involuntary*. Therefore, its statements are simply unresponsive to the question whether sexual advances or other conduct in a truly *voluntary* relationship rationally could support a characterization of those advances as harassment.

[27] 641 F.2d 934, 946.
[28] 753 F.2d 141, 146.

The Court's declarations that a woman employee "need not prove resistance to sexual overtures" or the absence of "capitulation to on-the-job sexual advances" are sound when limited to defining the elements of her *prima facie* case. Rational allocations of burdens of proof should avoid the assignment of responsibility for proving broadly inclusive negatives. It is surely a different question, however, whether an employer should be foreclosed from an affirmative defense against a charge of sexual harassment based on proof *it* offers that a supervisor's sexual relationship with the complaining employee was consensual on both sides.

This Court should make clear the central role voluntariness may play in determining whether sexual harassment has occurred and should assign to the employer as a matter of defense the burden of showing that the conduct complained of was sheltered by the employee's voluntary consent.

Conclusion

Title VII can be made an effective instrument for dealing with sexual harassment in the workplace. Doing so requires a purposive interpretation of the statutory definition of an agent for use in dealing with assertions of vicarious liability against the employer. While the possession by a harasser of supervisory responsibilities warrants his *prima facie* identification as his employer's agent, such a status ceases to be warranted upon the employer's showing (a) that it had a clearly communicated policy against sexual harassment coupled with a method whereby employees could report instances of sexual harassment in reasonable privacy and without risk of retaliation, (b) that the complaining employee made no such report, and (c) that the employer had no actual knowledge of the harassment or any constructive knowledge based on the awareness of non-culpable agents. In such circumstances, the recognition of a defense for the employer will provide an effective incentive for the private efforts of employers to eradicate

and remedy sexual harassment. The harassing supervisor—the only culpable party—would be left to respond appropriately to the wronged employee. As a minimum consequence of an employee's failure in the circumstances described to inform the employer of alleged harassment, the remedy provided should include no compensation for losses that could have been avoided if notice had been given.

While sexual harassment defies precise definition, its identity rests on the essential quality of its being unwelcome. Therefore, a showing of the total context to be considered in determining whether sexual harassment has occurred may include evidence that the relationship between the alleged harasser and the complainant was voluntarily and consensually sexual in character.

Respectfully submitted,

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BRIEF

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MERITOR SAVINGS BANK, FSB,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL SEEKING REVERSAL

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE DECISION BELOW FINDING AN EMPLOYER VICARIOUSLY LIABLE AND A SUPERVISOR'S EVIDENCE PER SE INADMISSIBLE TO DISPROVE A CLAIM OF SEXUAL HARASSMENT IMPOSES A STANDARD THAT IS LEGALLY UNSUPPORTED, UNDERMINES PUBLIC POLICY, AND DISCOURAGES EMPLOYERS FROM UNDERTAKING REASONABLE MEASURES TO PREVENT HARASSMENT	7
A. An Employer Should Not Be Held Vicariously And Absolutely Liable For Harassment By A Supervisor Acting Beyond The Scope Of Employment, Especially When The Employer Has No Notice And Has Discouraged Harassment, And When The Standard Would Encourage Unwarranted Punitive Awards In Other Forums	8
1. An Employer Should Not Be Liable For A Supervisor's Actions Outside The Scope Of Employment	8
2. Absent Actual Or Constructive Notice, An Employer That Is Unaware Of A Supervisor's Misconduct And Therefore Unable To Halt The Harassment Of An Employee Should Not Be Liable For Those Actions	10

TABLE OF CONTENTS—Continued

Page

3. An Employer's Efforts At Preventing Harassment Should Be Considered In Determining Liability 13

4. Adoption Of A Strict Liability Standard In This Case Could Subject Employers To Onerous And Punitive Damage Awards Under Other Laws Prohibiting Sexual Harassment 16

B. The Standard Imposed By The Court Of Appeals Is Unsupported By The Federal Rules Of Evidence, Race Discrimination Cases, The Legislative History Of Title VII, Or This Court's Rule For Deferring To EEOC's Guidelines 17

1. The Court's Rule Conflicts With The Federal Rules Of Evidence, Which Permit The Introduction Of Relevant Evidence Regarding Consent And Credibility 17

2. The Court's Rule Is Based Improperly Upon Cases Involving Race Discrimination 20

3. The Legislative History Of Title VII Supports Disparate Treatment Liability For Intentional Discrimination, Not Strict Liability 21

4. EEOC's Sex Harassment Guidelines Should Not Be Relied Upon To Impose Strict Liability 22

II. THIS COURT SHOULD ADOPT STANDARDS IN SEXUAL HARASSMENT CASES PERMITTING A SUPERVISOR TO REBUT A PLAINTIFF'S CHARGES AND AN EMPLOYER TO DEFEND ITSELF FROM LIABILITY FOR CONDUCT IT HAS TAKEN REASONABLE STEPS TO PREVENT 25

TABLE OF CONTENTS—Continued

Page

A. The Standard Should Require Proof That The Conduct Was Unwelcome 25

B. The Standard Should Require That The Conduct Affected A Term, Condition, Or Privilege Of Employment 26

C. The Standard Should Hold An Employer Responsible For A Supervisor's Harassment Only Where The Employer Knew Or Should Have Known Of The Action, And Failed To Remedy It 27

D. The Standard Should Permit An Employer To Defend Its Actions Where It Lacked Actual Or Constructive Notice And Undertook Reasonable Preventative Measures 27

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 22
Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972) 21
Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 3
Barnes v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977) 12, 15, 20, 21
Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984) 11, 15, 27
Beaumont v. Brown, 401 Mich. 80 (1977) 17
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 15, 25, 27, 28
Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978) 21, 27
City of Green Cove Springs v. Donaldson, 348 F.2d 197 (5th Cir. 1965) 9
Commodore Home Systems, Inc. v. Superior Court of San Bernadino County, 649 P.2d 912 (Cal. 1982) 17
Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) 27
Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without published opinion on jurisdictional grounds (failure defer to state agency)*, 562 F.2d 55 (9th Cir. 1977) 9
Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) 10-11, 12, 15, 18-19
Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983) 17
Downes v. FAA, 39 Fair Empl. Prac. Cas. (BNA) 70 (Fed. Cir. 1985) 27
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EEOC Decision No. 84-1, 33 Fair Empl. Prac. Cas. (BNA) 1887 (1983) 12, 26
EEOC v. Murphy Motor Freight Lines, Inc., 480 F. Supp. 381 (D. Minn. 1980) 20

TABLE OF AUTHORITIES—Continued

Page

Ferguson v. E.I. duPont de Nemours and Co., Inc., 560 F. Supp. 1172 (D. Del. 1983) 7, 9, 11, 13, 24
Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) 21
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 25
Gan v. Kepro Circuit Systems, 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982) 12, 19, 26
General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977) 22, 23
Glasgow v. Georgia Pacific Corp., 693 P.2d 708 (Wash. 1985) 26, 27
Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976) 20
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 22
Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) 16
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 10, 11, 12, 25, 26, 27
Holien v. Sears, Roebuck & Co., 36 Fair Empl. Prac. Cas. (BNA) 137 (Or. 1984) 17
Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985) 12, 15
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 3, 22, 25
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 10, 11, 13, 15, 27
Kyriazi v. Western Elec. Co., 476 F. Supp. 335 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981) 16, 17
Ledsinger v. Burmeister, 114 Mich. App. 12 (1982) 17
Lee v. Conecuh County Bd. of Education, 634 F.2d 959 (5th Cir. 1981) 25
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 25
McLean v. United States, 377 A.2d 74 (D.C. App. 1977) 18

TABLE OF AUTHORITIES—Continued

	Page
Meyers v. ITT Diversified Credit Corp., 527 F. Supp. 1064 (E.D. Mo. 1981)	14
Neidhardt v. D.H. Holmes Co., 21 Fair Empl. Prac. Cas. (BNA) 452 (E.D. La. 1979)	11
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)	3
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United States v. Brown, 17 M.J. 544 (1983)	18
Vinson v. Taylor, 23 Fair Emp. Prac. Cas. (BNA) 37 (D.D.C. 1980)	4, 10, 11, 12
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Washington v. Davis, 426 U.S. 229 (1976)	22
Wimberly v. Shoney's Inc., 39 Fair Empl. Prac. Cas. (BNA) 444 (S.D. Ga. 1985)	14, 27
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Federal Statutes:

Title 28, United States Code (1982)

Fed. Rules Evid. Rule 401	18
Fed. Rules Evid. Rule 402	18
Fed. Rules Evid. Rule 412	18
Fed. Rules Evid. Rule 608(a)	18

TABLE OF AUTHORITIES—Continued

	Page
Title 42, United States Code (1982)	
§§ 2000e, *et seq.* (Title VII, Civil Rights Act of 1964, as amended)	2, 8, *passim*
Federal Regulations:	
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Interim Interpretive Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1980)	3
State Statutes:	
California, Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996 (Deering 1981)	17
Michigan, Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.*	16
Legislative Materials:	
110 Cong. Rec. 8194 (1964)	22
110 Cong. Rec. 12723-24 (1964)	22
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TABLE OF AUTHORITIES—Continued

	Page
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL SEEKING REVERSAL

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae seeking reversal of the decision below. The parties' written consents to file this brief have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public

in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various equal employment laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* EEAC members have instituted preventative measures designed to discourage sexual harassment, which include: adoption of policies expressly forbidding supervisors and employees to engage in sexually harassing conduct; publication of employee manuals and posting of notices to inform employees of their rights; and training supervisors to recognize and halt harassment in the workplace. In addition, many members have implemented formal anti-harassment procedures, whereby an aggrieved employee can officially inform higher management authorities, or even bring charges against a co-worker or supervisor who has engaged in harassment in the workplace. Thus, EEAC has a direct interest in the issues presented for this Court's consideration in the instant case—*i.e.*, whether the court of appeals erred in declaring all evidence regarding the voluntary nature of a personal relationship between an employee and supervisor *per se* inadmissible, and in finding an employer vicariously liable even though the employer had no knowledge of the sexual conduct and had

undertaken reasonable measures to discourage such conduct.

The decision by the District of Columbia Circuit making an employer vicariously liable for the acts of its supervisors, even though those acts are unknown and expressly forbidden, will turn employers into "insurer[s] that all relationships between supervisors and employees are entirely asexual." *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir.), *reh'g denied en banc*, 760 F.2d 1330, 1331 (D.C. Cir. 1985) (Bork, J., dissenting). The court of appeals' rule that the voluntariness of a relationship has "no materiality whatsoever," 753 F.2d at 146, means that employers could be held financially responsible for relationships which began voluntarily but turn sour, should one party later choose to allege harassment.

Because of its interest in the issue of sexual harassment, EEAC has advised the Equal Employment Opportunity Commission (EEOC) on a formal and informal basis, including the filing of comments to EEOC's Interim Interpretive Guidelines on Sexual Harassment, published at 29 C.F.R. Part 1604 (1980). Because of its interest in discrimination issues generally, EEAC has also filed amicus curiae briefs with this Court in numerous cases involving the interpretation of Title VII of the Civil Rights Act of 1964, including *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); and *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983).

STATEMENT OF THE CASE

Plaintiff, Mechelle Vinson, was hired in 1974 by Capital City Federal Savings and Loan Association, now Meritor Savings Bank (hereinafter "the Bank"). Sidney Taylor, a Branch Manager and Assistant Vice President,

served as Vinson's supervisor, even though Taylor had no authority to hire, fire or promote. Vinson was promoted based on merit, eventually to the position of Assistant Branch Manager. In 1975, however, Vinson claimed that she accompanied Taylor to dinner and later, allegedly fearing job dismissal, engaged in sexual relations. Vinson also made uncorroborated claims that for two years, Taylor harassed Vinson and other employees repeatedly, both during and after banking hours. Taylor denied the allegations, and claimed that Vinson was terminated in 1978 as a result of abuse of sick leave.

The Bank also denied Vinson's story, and asserted that any sexual harassment by Taylor was unknown, unauthorized, and, as much as possible, discouraged. Moreover, the Bank had instituted a strong and well-publicized policy prohibiting discrimination, as well as a formal grievance procedure, and had designated an EEO advisor to monitor workplace discrimination. Vinson, however, never attempted to use the Bank's complaint procedure, and never complained to persons with authority.

The district court ruled in favor of Taylor and the Bank on all counts, holding that Vinson was not discriminated against, and that the Bank was not liable because it was without notice of the alleged activity. *Vinson v. Taylor*, 23 Fair Emp. Prac. Cas. (BNA) 37 (D.D.C. 1980). The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the voluntariness of Vinson's participation in any relationship with Taylor "had no materiality whatsoever," and that evidence as to Vinson's dress and behavior while at work "had no place in this litigation." 753 F.2d at 146 & n.36. With respect to vicarious employer liability, the court of appeals announced the unequivocal rule that "employers must answer for sexual harassment of *any* subordinate by *any* supervising superior," 753 F.2d at

150 (emphasis added), even though the employer neither knew nor reasonably could have known about the harassment, and had no opportunity to stop it.

The employer's request for a rehearing *en banc* also was denied. In a cogent dissent, however, Judge Bork (joined by Judges Scalia and Starr) observed that "[b]y depriving the charged person of any defenses, [the panel] mean[s] that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it." 760 F.2d at 1330. The dissent also disputed the panel's ruling that the supervisor may not introduce evidence that the plaintiff wore provocative clothing or engaged in suggestive conduct to show that she was a willing participant in the sexual relationship, rather than a victim of harassment, arguing that these evidentiary "rulings make certain that to be charged is to be guilty." *Id.* at 1331. With regard to vicarious employer liability, Judge Bork pointed out that an employer is left helpless to defend itself, stating that "[t]he panel decision makes the employer vicariously liable for the acts of the supervisor even though those acts were wholly unknown to the employer and were directly contrary to his instructions." *Id.* The dissent concluded that the "employer is virtually converted into an insurer that all relationships between supervisors and employees are entirely asexual," and that while the "employer has no way of preventing sexual relationships, he is defenseless and must pay if they occur and are then claimed to be harassment." *Id.*

SUMMARY OF ARGUMENT

Sound legal, practical, and equitable considerations all favor reversal of the decision below holding the Bank responsible for Taylor's alleged harassment of Vinson. Under agency law principles, the Bank should not be liable, because any conduct arguably constituting harass-

ment clearly fell outside the scope of Taylor's employment. From a practical perspective, because Vinson failed to inform higher authorities or utilize the available complaint procedure, the Bank did not have actual, constructive, or imputed notice of Taylor's actions, which would have allowed it to halt any improper conduct. And from an equitable standpoint, the measures undertaken by the Bank to prevent discrimination, which mirror recommendations suggested by many judges and commentators opposed to sexual harassment, clearly should at least have been considered before liability was imposed. Indeed, the standard of liability adopted by the court below flouts traditional notions of equity, because it does not allow the employer to present defenses.

Furthermore, the appellate court's strict liability standard is in conflict with established rules of evidence, and is unsupported by the authorities cited in its opinion. Not only did the court fail to cite any rule justifying its exclusion of relevant evidence, but Vinson's reliance upon the protective rule adopted in rape cases is entirely misplaced, because that rule specifically recognizes the materiality of evidence regarding consent and credibility, and permits its introduction. The court's reliance on cases involving race discrimination was also erroneous, because sexual advances, not *per se* offensive, merit analysis under a less stringent standard. Further, the legislative history of Title VII provides no support for the court's holding, since Congress clearly did not intend an employer to be "virtually converted into an insurer that all relationships between supervisors and employees are entirely asexual." *See Vinson*, 760 F.2d at 1331 (Bork, J., dissenting).

Also improper was the court's reliance upon the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984) ("guidelines"). First, the court failed to consider the crucial flexibility that the guidelines provide in determining the appropriate circumstances in which strict liability should apply. 29 C.F.R. § 1604.11 (c). Moreover, the EEOC historically has been divided

regarding the interpretation of its own guidelines. Most importantly, the guidelines are not entitled to great deference because their underlying rationale is unpersuasive. *Ferguson v. E.I. duPont de Nemours and Co., Inc.*, 560 F. Supp. 1172 (D. Del. 1983).

This Court, therefore, should reject the strict liability rule adopted below and instead craft a standard permitting the consideration of a supervisor's scope of employment, an employer's knowledge and preventative efforts, and the policy consequences of liability. First, this standard should require proof that the conduct was unwelcome. Second, it should require that the harassment affected a term, condition or privilege of employment. Third, the standard should hold an employer responsible for a supervisor's harassment only where the employer knows or should have known of the action, and failed to remedy. Finally, the standard should permit an employer to present defenses under appropriate circumstances.

ARGUMENT

I. THE DECISION BELOW FINDING AN EMPLOYER VICARIOUSLY LIABLE AND A SUPERVISOR'S EVIDENCE PER SE INADMISSIBLE TO DISPROVE A CLAIM OF SEXUAL HARASSMENT IMPOSES A STANDARD THAT IS LEGALLY UNSUPPORTED, UNDERMINES PUBLIC POLICY, AND DISCOURAGES EMPLOYERS FROM UNDERTAKING REASONABLE MEASURES TO PREVENT HARASSMENT

This case presents issues of extreme concern to EEAC's member companies. They recognize that sexual harassment in the workplace can lead to lower productivity, decreased work quality, lower employee morale, absenteeism, the loss of valued workers due to resignations, workplace accidents, and increased costs engendered by discrimination suits. Many companies, therefore, have adopted strong preventative measures, as well as investigative

and remedial procedures, designed to combat the problem of sexual harassment in the workplace. The rule announced by the court of appeals, however, improperly declares irrelevant whether a supervisor is acting outside the scope of employment, whether an employer knows of a supervisor's conduct, as well as whether an employer has adopted measures to prevent, recognize and halt sexual harassment.

A. An Employer Should Not Be Held Vicariously And Absolutely Liable For Harassment By A Supervisor Acting Beyond The Scope Of Employment, Especially When The Employer Has No Notice And Has Discouraged Harassment, And When The Standard Would Encourage Unwarranted Punitive Awards In Other Forums

1. *An Employer Should Not Be Liable For A Supervisor's Actions Outside The Scope Of Employment*

The panel below properly began its analysis of liability under principles of agency, but sidetracked its legal analysis and unjustifiably imposed a standard of strict liability. The panel's vicarious liability theory is derived from Title VII's definition of employer as including "any agent of such a person." *Vinson v. Taylor*, 753 F.2d 141, 148 (D.C. Cir.), *reh'g denied en banc*, 760 F.2d 1330 (D.C. Cir. 1985); 42 U.S.C. § 2000e(b). The panel apparently read this language to mean that if a person is the agent of another for any purpose, then the principal is automatically liable for any conduct by that person which violates Title VII. This reading, however, disregards the common law principle that an employee must be acting as an employer's agent *at the time of the alleged violation* in order for vicarious liability to adhere. *See Restatement (Second) of Agency* § 219(2) (1958). At common law, an employee is not defined as an agent when performing an act outside the scope of employment. W. Prosser and P. Keeton, *Prosser and Keeton on Torts*

§ 70 (5th ed. 1984). It follows, therefore, that an employee's act of sexual harassment may not be imputed to the employer if the employee acts outside the scope of employment.

The scope of Taylor's employment in this case clearly did not extent to a personal adventure which the Bank neither directed, acquiesced in, ratified, nor could have anticipated. *See Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (1975), *vacated and remanded without published opinion on jurisdictional grounds (failure to defer to state agency)*, 562 F.2d 55 (9th Cir. 1977); *Ferguson v. E.I. duPont de Nemours and Co., Inc.*, 560 F. Supp. 1172, 1119 (D. Del. 1983) (supervisor's act is outside scope of authority in hostile environment case, and agency principles do not apply); *see also City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 202 (5th Cir. 1965). Therefore, the decision below, declaring the Bank vicariously liable for acts that were contrary to its official policy and express instructions, "is at odds with traditional practice which was not to hold employers liable at all for their employee's intentional torts involving sexual escapades." *Vinson*, 760 F.2d at 1332 (Bork, J., dissenting).[1]

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[1] Indeed, as noted by Judge Bork in his separate dissent, an employer is only liable for his employee's intentional torts under traditional tort theory when their "purpose . . . is wholly or in part to further the master's business." W. Prosser and P. Keeton at 505. 760 F.2d at 1332 & n.6. Such a theory clearly would absolve the Bank of liability, since "[i]ntentional torts involving sexual escapades almost never result in employer liability because they are personally motivated. It is perhaps conceivable but certainly highly unlikely that a supervisor would engage in sexual harassment for the purpose of furthering his employer's business." *Id. See New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment under Title VII*, 61 B.U.L. Rev. 535, 539 (1981) (under common law test vicarious Title VII responsibility would be rare). The panel below simply brushed aside these considerations with the observation that "[t]raditional principles of respondeat superior, as they obtain in the field of torts,

2. *Absent Actual Or Constructive Notice, An Employer That Is Unaware Of A Supervisor's Misconduct And Therefore Unable To Halt The Harassment Of An Employee Should Not Be Liable For Those Actions*

More important than its failure to apply a strict agency analysis, the court below erred from a logical and practical perspective in holding that "Title VII imposes [vicarious liability] upon an employer without specific notice of sexual harassment by supervisory personnel. . . ." *Vinson*, 753 F.2d at 147. First, the court below erroneously found the Bank responsible for Taylor's actions even though it had neither actual nor constructive notice.[2] An employer must be notified in fact, or at least be able to infer that harassment has occurred, before it can take specific action, in addition to preventative measures, to halt the offensive activity. Consistent with this practical rationale, several circuits have adopted a notice requirement as an element of a plaintiff's prima facie case involving hostile environment. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Craig v. Y & Y Snacks, Inc.*, 721

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are not altogether suitable for resolution of questions of Title VII law." 753 F.2d at 150. The panel, however, provided no satisfactory justification for its refusal to apply those traditional principles in this case, and, as demonstrated below, compelling policy considerations in fact support their application here.

[2] Vinson argues that the Bank had notice of Taylor's actions. The district court, however, specifically found that no bank official superior to Taylor had notice of any harassment or other sexual discrimination, and that Vinson had conceded this point. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980). The court of appeals' holding that employers are absolutely liable for hostile environment sex harassment regardless of notice is based on this finding. *Vinson*, 753 F.2d at 147, 150-52. Thus, this Court should reject Vinson's argument that absolute liability should be imposed here because the employer had "both actual and constructive" notice and because the case "is both a *quid pro quo* and hostile environment case." *See* Brief in Opposition to Petition for Certiorari at 21.

F.2d 77, 80-81 (3d Cir. 1983); *Tomkins v. Public Service Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977).[3]

Other circuits treat an employer as *de facto* "notified" under the theory of constructive notice where there exists pervasive harassment in the workplace. *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981); *Henson*, 682 F.2d at 905. The instant case, however, does not involve pervasive harassment. In fact, the district court noted that other employees did not complain of harassment to bank officials, *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) at 41, a specific rejection of Vinson's contention that the Bank received notice based on Taylor's sexual harassment of other employees, or his creation of an offensive work environment generally. *Id.* The Bank, therefore, was never put on notice because of pervasive harassment, and should not have been expected to undertake additional preventative measures.

Other circuits have found constructive knowledge by imputing a supervisor's authority to the employer where the supervisor has broad or plenary authority to, for example, hire, fire, and promote. *Craig*, 721 F.2d at 80;

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[3] For example, the Eleventh Circuit requires that where "the plaintiff seeks to hold the employer responsible for the hostile environment" . . . "she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Henson*, 682 F.2d at 905. Similarly, the Third Circuit holds that an employer is liable only when it has "actual or constructive knowledge," and "does not take prompt and appropriate remedial action after acquiring such knowledge." *Tomkins*, 568 F.2d at 1048-49; *see also Katz*, 709 F.2d 251 (employer held liable based on plaintiff's direct complaints, pervasiveness of harassment, and harassment policy that was known by supervisors not to be effective); *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984) (relying on *Katz* to find co-employee liability); *Ferguson*, 560 F. Supp. at 1199 (rejecting EEOC guidelines, better rule requires actual or constructive knowledge); *Neidhardt v. D.H. Holmes Co.*, 21 Fair Empl. Prac. Cas. (BNA) 452 (E.D. La. 1979).

see Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985)[4]; *see also Scott v. Sears, Roebuck & Co.*, 605 F. Supp. 1047 (N.D. Ill. 1985). This case, however, does not involve a supervisor who had been cloaked with plenary authority. In fact, the district court specifically found that Taylor did not have the authority to hire, fire, or promote. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) at 42. The court also found that even though Taylor held the title of Assistant Vice President, there was "no evidence" regarding whether Taylor's title was "honorary." *Id.* Clearly, therefore, Taylor's actions cannot be imputed to the Bank based on the grant of broad or plenary authority.

Furthermore, it is ordinarily the plaintiff, not the employer, who is in the best position to know whether sexual advances truly constitute harassment. *Gan v. Kepro Circuit Systems*, 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1981); *Henson*, 682 F.2d at 903; *see* 29 C.F.R. § 1604.11(a); *EEOC Decision 84-1*, 33 Fair Empl. Prac. Cas. (BNA) 1887, 1890 (1983). Where workplace harassment is prohibited, an employer usually does not learn of a supervisor's actions outside the scope of employment until it is notified, and the employer is usually unable to discern whether normal workplace advances are invited, welcome, tolerable or offensive. *See Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J., concurring). Accordingly, the plaintiff should maintain the

[4] In interpreting *Craig*, the Seventh Circuit noted that while the "Third Circuit did not overrule *Tomkins* or repudiate the rhetorical standard adopted in that case, it redefined the 'constructive' knowledge component in a way that allowed the court to shift from a fault-based liability standard to one of strict liability." *Horn*, 755 F.2d at 604 n.7. This interpretation of *Craig* clearly defies the holding of that case. *Craig* stands for the proposition that an employer can have constructive knowledge where an employer has "unbridled authority" to hire, fire and promote. *Craig*, 721 F.2d at 80-81. Since Taylor did not have "unbridled authority," the Bank would not be vicariously liable under *Craig*.

burden of informing the employer when workplace contact becomes offensive, particularly where, as here, the employer has established procedures through which employees can present such complaints to higher management. *See Katz*, 709 F.2d 251 n.7 ("ultimate burden remains throughout on the plaintiff to prove the existence" of harassment).

The court of appeals' finding that the existence of knowledge, whether actual, constructive or imputed, is irrelevant thus undermines the policy rationale for holding an employer liable in the first place: that the employer must be able to halt harassment as soon as it is discovered. *See, e.g., Ferguson*, 560 F. Supp. at 1199. In a practical sense, therefore, an employer is discouraged from attempting to detect workplace harassment, since the employer has already become an insurer under the court's rule. This Court should repudiate this inequitable result and instead craft a rule which encourages employers to detect and halt offensive conduct.

3. *An Employer's Efforts At Preventing Harassment Should Be Considered In Determining Liability*

Many employers have undertaken measures designed to prevent, detect and halt sexual harassment. The existence of such measures, where strictly and fairly enforced, clearly should be relevant in considering liability. Ironically, however, some judges and commentators argue in favor of a strict liability standard as a means of promoting the adoption of preventative and remedial measures of precisely the sort already implemented by the Bank and many employers generally. The fallacy of this reasoning is that much of the incentive to adopt such measures is lost if their adoption is deemed irrelevant to the question of the employer's liability when harassment nevertheless occurs.

For example, one commentator argues that a strict liability standard should be imposed to "encourag[e] employers to institute internal grievance procedures and criteria of review." Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1462 (1984). The Bank, however, had instituted a grievance procedure designed specifically for complaints regarding supervisory conduct. The imposition of a strict liability standard, therefore, would have done nothing to change the Bank's procedure. In fact, Vinson's failure to use these procedures should serve to absolve the Bank of liability. *See Wimberly v. Shoney's, Inc.*, 39 Fair Empl. Prac. Cas. (BNA) 444 (S.D. Ga. 1985); *Meyers v. ITT Diversified Credit Corp.*, 527 F. Supp. 1064 (E.D. Mo. 1981).

Other commentators recommend that employers affirmatively discuss the subject of harassment with employees and inform them of their right to raise the issue under Title VII. Katz, *Sexual Harassment in the Workplace*, 29 Prac. Law. 29, 32 (1983) (quoting the EEOC guidelines); *See* B. Schlei and P. Grossman, *Employment Discrimination Law* (BNA) (2d ed. 1983) at 429. Here the Bank had held training sessions for supervisors and had specifically notified employees of their rights by posting the equal employment policy and issuing employee handbooks. Vinson Appendix at 116. *See* F. Suggs, *Advising Your Corporate Client on Avoiding Charges of Sexual Harassment*, 46 Ala. Law. 176 (1985). While a company policy may be ineffective if it is known only to a few officers, *Young v. Southwestern Savings and Loan Assoc.*, 509 F.2d 140, 144 (5th Cir. 1975), a well-publicized policy should be considered by a court before imposing liability.

The EEOC Guidelines suggest that an employer express strong disapproval, as well as develop appropriate sanctions and methods to sensitize all concerned. Guidelines on Discrimination Because of Sex, 29 C.F.R.

§ 1604.11(f). *See Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981). The Bank had adopted a strong policy of non-discrimination and an "aggressive effort" to "orient employees" and "maintain an open line of communication." Vinson Appendix at 113. The Bank also had instituted sanctions involving dismissal, and had appointed an equal employment coordinator, with direct responsibility to the president and board of directors, to monitor the workplace for traces of discrimination. *Id.* at 113-25.

Other suggested recommendations include undertaking remedial measures upon learning of the harassment. *Barrett*, 726 F.2d 424; *Craig*, 721 F.2d 77; *Katz*, 709 F.2d 251; *See* K. Bogas and S. Fellman, *Sexual Harassment in the Workplace*, 63 Mich. Bar J. 818, 822 (1984). It is abundantly clear, however, that the Bank could not have initiated the remedial procedures it had established because it did not know, either actually or constructively, of the alleged harassment, or even of the relationship between Vinson and Taylor. Thus, the Bank undertook reasonable steps to prevent any harassment, and could have done little further without actual or constructive knowledge of the relationship.

The suggestion that employers police voluntary employee relationships in the workplace or promulgate a rule prohibiting and monitoring sexual advances away from the job would be both unreasonable and unworkable. First, such a rule would be difficult to enforce. *See Barnes*, 561 F.2d at 1000 (MacKinnon, J., concurring). Second, such a rule represents a very costly method of prevention. *See Vinson*, 760 F.2d at 1331 n.3 (Bork, J., dissenting). *But cf. Horn*, 755 F.2d at 605 (holding the employer strictly liable for harassment partly because "the employer is a more efficient cost avoider than the injured plaintiff"). Most importantly, such employer action would be outrageous. In fact, the Oregon Court of Appeals recently found an employer liable under the tort theory of outrageous conduct when it fired an employee

for dating a co-worker. *Patton v. J.C. Penney Co., Inc.*, 120 LRRM 3131 (Or. Ct. App. 1985).

4. *Adoption Of A Strict Liability Standard In This Case Could Subject Employers To Onerous And Punitive Damage Awards Under Other Laws Prohibiting Sexual Harassment*

Some cases and commentators have attempted to allay employers' fears of high damage awards under a Title VII strict liability standard. C. Cerutti, *Differing Standards of Employer Liability for Sexual Harassment of Working Women*, 27 Ariz. L. Rev. 155, 163 (1985); J. Vermeulen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 Cap. U.L. Rev. 499, 508 (1981); J. Smith, *Prologue to the EEOC Guidelines on Sexual Harassment*, 10 Cap. U.L. Rev. 471, 475 (1981). However, a rule which denies defenses to a charged party and imposes vicarious employer liability could lead to unintended results when state claims are brought independent of, or pendent to, a Title VII harassment charge. Under the appellate court's substantive rule of liability, such claims seemingly would permit punitive awards against employers who have no notice, and compensate plaintiffs who may have initiated the relationship, but who later allege pain and suffering, *see Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 524 (D.D.C. 1981); *Kyriazi v. Western Electric Co.*, 476 F. Supp. 335 n.3 (D.N.J. 1979), *aff'd.*, 647 F.2d 388 (3d Cir. 1981), even though such awards would not be allowed under federal law, *see Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 197 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Scott*, 605 F. Supp. 1047.[5] The court's rule holding an employer

[5] For example, a plaintiff may recover tort damages pursuant to Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.*, for incidents which may also establish a prima facie case under Title VII, since the Act contains a definition of sexual harassment identical to that contained in EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1980). *See generally, Ledsinger v. Burmeister*, 114 Mich. App. 12 (1982). Similarly, California's Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996 (Deering 1981), permits an award of punitive damages for a violation of its provisions. *Commodore Home Systems, Inc. v. Superior Court of San Bernadino County*, 649 P.2d 912 (Cal. 1982). In this regard, courts have recognized a cause of action based on the theories of intentional infliction of emotional distress, *Cummings v. Walsh Construction Co.*, 561 F. Supp. 872 (S.D. Ga. 1983), assault and battery, *Rogers*, 526 F. Supp. 523, invasion of privacy, *Beaumont v. Brown*, 401 Mich. 80, 105 (1977), wrongful discharge, *Holien v. Sears, Roebuck & Co.*, 36 Fair Empl. Prac. Cas. (BNA) 137 (Or. 1984), and interference with contract. *Kyriazi*, 476 F. Supp. 335. This Court's decision is likely to influence the liability findings in these and other forums, and a strict liability standard would prove onerous and burdensome.

vicariously liable, if relied upon as a standard for assessing liability in other forums, could thus result in massive damage awards for conduct that is disputed by the supervisor and unknown by the employer, a result that would be contrary to the clear language and statutory history of Title VII.

B. The Standard Imposed By The Court Of Appeals Is Unsupported By The Federal Rules Of Evidence, Race Discrimination Cases, The Legislative History Of Title VII, Or This Court's Rule For Deferring To EEOC's Guidelines

1. *The Court's Rule Conflicts With The Federal Rules Of Evidence, Which Permit The Introduction Of Relevant Evidence Regarding Consent And Credibility*

The court of appeals erred in holding that the voluntariness of Vinson's participation in any relationship with Taylor "had no materiality whatsoever," and that the evidence regarding Vinson's dress and behavior while at work "had no place in this litigation." *Vinson*, 753 F.2d at 146 & n.36. First, the panel cited no rules of

evidence or other authority for suppressing evidence relevant to the issues of Taylor's discriminatory intent or Vinson's consent.[6] "The panel has thus failed to perform the analysis required before relevant evidence may be excluded." *Vinson*, 760 F.2d at 1331 n.1 (Bork, J., dissenting).

Second, Vinson's attempt to support the panel's holding by analogizing to rape cases under Rule 412 of the Federal Rules of Evidence, Brief in Opposition to Petition for Certiorari at 28-31, is misplaced. That rule specifically permits the introduction of evidence regarding "past sexual behavior with the accused . . . upon the issue of *whether the alleged victim consented* to the sexual behavior with respect to which rape or assault is alleged." Fed. Rules Evid. Rule 412(b)(2)(B) (emphasis added). *See United States v. Brown*, 17 M.J. 544 (1983). In fact, the credibility of the complainant in rape cases must be weighed on evidence that is directly related to whether she "consented to a sexual act with the accused." *McLean v. United States*, 377 A.2d 74, 79 (D.C. App. 1977).

Third, the court of appeals' evidentiary standard disregards important issues of credibiilty inherent in resolving a claim of sexual harassment generally. *See*

[6] Relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rules Evid. Rule 401. The Bank's proffered evidence of Vinson's fantasies regarding sexual relationships with co-workers has a tendency to call into question the existence of her relationship with Taylor. Similarly, her alleged voluntary participation in the relationship, as well as her work behavior and dress, has a tendency to call into question the offensiveness of her work environment. *See* Fed. Rules Evid. Rule 608(a) (reputation for truthfulness or untruthfulness used to attack credibility). Such evidence is admissible absent constitutional, congressional or judicial rules to the contrary. Fed. Rules Evid. Rule 402.

Craig, 721 F.2d at 79. This case involves an allegation of harassment, even rape, by Vinson. Taylor, on the other hand, alleges that Vinson attempted to initiate a relationship, but that he spurned her advances—a vastly different characterization. The appellate court's rule that this evidence is inadmissible will result in an unreasonable disregard of clearly relevant evidence. The next case could involve a plaintiff who clearly "welcomed and encouraged" a supervisor's questionable conduct. *See Gan*, 28 Fair Empl. Prac. Cas. at 641. Another case could present a frivolous charge of harassment, rebutted by a supervisor and several witnesses. The next plaintiff could be compelled by ulterior motives in bringing the charge, such as a desire to transfer out of a department, leverage a raise, or retaliate against a supervisor for unpopular, but perfectly legitimate supervisory actions. None of these issues, however, may be considered by the trial judge under the court's rule. "By depriving the charged person of any defenses," the court's holding means that "sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it." *Vinson*, 760 F.2d at 1330 (Bork, J., dissenting). Such a rule thus prevents the trial court from resolving important basic issues.

Generally, EEAC and its employer members have no desire to place a complaint on trial regarding issues unrelated to her relationship with the accused, but crucial relevant issues have been declared legally immaterial by the court's holding. Judge Bork explained the ramifications of such a dangerous rule when he stated:

> The harmfulness of the panel decision is augmented by additional rulings on what evidence is to be admissible in Title VII sexual harassment cases. On the one hand, *the panel holds that plaintiffs must be allowed to introduce evidence of their supervisor's behavior toward other employees in an effort to establish a pattern or practice of sexual harassment.*

753 F.2d at 146. *On the other hand, the panel also holds that a supervisor must not be allowed to introduce similar evidence of an employee's dress or behavior in an effort to prove that any sexual advances were solicited or welcomed. Id.* at 146 n.36. In this case, evidence was introduced suggesting that the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to other employees at the bank. While hardly determinative, *this evidence is relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in.* Obviously, such evidence must be evaluated critically and in the light of all the other evidence in the case, but *it is astonishing that it should be held inadmissible.* Added to the elimination of any voluntariness defense, *these rulings make certain that to be charged is to be guilty.*

Id. at 1330-31 (emphasis added) (footnote omitted).

2. *The Court's Rule Is Based Improperly Upon Cases Involving Race Discrimination*

The rule adopted by the D.C. Circuit is based primarily, but improperly upon cases involving race discrimination. A sexual advance has characteristics which distinguish it from racial or religious harassment, and should be analyzed under a different standard. An employee who had been subjected to racial or religious epithets, usually malicious and resulting in psychological harm, is accorded special protection by many courts. *Barnes*, 561 F.2d at 999 n.5 (MacKinnon, J., concurring); *see Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976); *EEOC v. Murphy Motor Freight Lines, Inc.*, 480 F. Supp. 381 (D. Minn. 1980); *see also Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *see generally*, 61 B.U.L. Rev. at 546.[7] Sexual advances in the workplace, however, re-

[7] The panel opinion relies on several decisions in other circuits in support of the proposition that employers are vicariously liable for a supervisor's sexual harassment, including *Calcote v. Texas Educ. Found., Inc.*, 578 F.2d 95 (5th Cir. 1978), *Young*, 509 F.2d 140, *Anderson v. Methodist Evangelical Hosp., Inc.*, 464 F.2d 723 (6th Cir. 1972) and *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977). *Vinson*, 753 F.2d at 149 n.67. Judge Bork noted that those cases "do not provide us with much guidance" since those decisions "discuss vicarious liability under Title VII in the somewhat different situation where *racial* discrimination is at issue." 760 F.2d at 1332 n.5 (emphasis added). Judge Bork concluded that "[n]one of the cases cited analyze in detail the precise nature of Title VII vicarious liability and most of them devote only a single conclusory sentence of analysis to the complicated issue." *Id.*

flect "social patterns that to some extent are normal and exceptable. It is the abuse of the practice, rather than the practice itself, that arouses alarm." *Barnes*, 561 F.2d at 1001 (MacKinnon, J., concurring). *See* J. Vermeulen at 529 (1981) (recognizing a "valid concern" that sexual advances are not "intrinsically offensive," but can be a "normal part of the work situation," thus creating a duty to inform the harasser). Thus, a strict liability standard, like that in cases involving racial or religious epithets, is entirely unwarranted.

3. *The Legislative History Of Title VII Supports Disparate Treatment Liability For Intentional Discrimination, Not Strict Liability*

The court below also erred in its relience upon the legislative history of Title VII to impose a vicarious liability standard. The legislative history of Title VII provides no support for the court's holding, and the fact that "the prospect of vicarious employer accountabiilty was *raised* before Congress," *Vinson*, 753 F.2d at 148 (emphasis added), is completely irrelevant to the issue of whether Congress *intended* an employer to be "virtually converted into an insurer that all relationships between supervisors and employees are entirely asexual." *See Vinson*, 760 F.2d at 1331 (Bork, J., dissenting).[8]

[8] The court erred in referring to an "unsuccessful attempt to amend the bill [which became Title VII] to incorporate a 'will-

4. *EEOC's Sex Harassment Guidelines Should Not Be Relied Upon To Impose Strict Liability*

The court below erred in relying wholesale upon EEOC's Guidelines on Sexual Harassment regarding vicarious liability as "persuasive indicators of congressional intent." *Vinson*, 753 F.2d at 148. The court noted that the guidelines are "entitled to great deference" since they are "administrative interpretation[s] of the Act by the enforcing agency." *Id. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975), *quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 433-44 (1971). This Court, however, has admonished courts not to defer automatically to EEOC's guidelines. *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976). Rather, whether the guidelines are entitled to deference depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 142, *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (rejecting EEOC guidelines on bona fide seniority systems); *Washington v. Davis*, 426 U.S. 229 (1976) (rejecting EEOC guidelines on employment selection procedures).

The court below quoted the guidelines at Section 1604.11(c) for the statement that:

> Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents

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fulness' requirement," *Vinson* 753 F.2d at 148 n.59. In fact, a subsequent amendment to the bill required that an unlawful employment practice be "intentionally" engaged in before relief may be granted, a standard which inherently rejects a strict liability theory. 110 Cong. Rec. 12723-24 (1964). *See* 110 Cong. Rec. at 8194 (1964). This intent requirement was codified at 42 U.S.C. § 2000e-5(g).

> and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

753 F.2d at 149. The court, however, failed to quote the next sentence, which is relevant to the issue herein:

> *The Commission will examine the circumstances* of the particular employment relationship and the job functions performed by the individual *in determining whether an individual acts in either a supervisory or agency capacity.*

Section 1604.11(c) (emphasis added). The court thus applied the guidelines without taking into consideration the crucial flexibility that the guidelines provide in determining the appropriate circumstances in which strict liability should apply, clearly disregarding this Court's deference standard regarding internal consistency or thoroughness of consideration. *Gilbert*, 429 U.S. at 142.

This interpretation is supported most recently in EEOC's internal debate regarding the interpretation of its guidelines regarding vicarious liability. In calling the decision below a "misconstruction of our guidelines," Commissioner Rosalie Gaull Silberman argued in an October 28, 1985, memorandum that the guidelines do not compel a strict liability rule in hostile environment cases. R. Silberman, *EEOC Memorandum Regarding Commission Participation as Amicus Curiae in PSFS Savings Bank, FSB v. Vinson*, 210 Daily Lab. Rep. (BNA) E-1 (Oct. 30, 1985). Acting General Counsel Johnny Butler advocated a contrary position at EEOC's October 19 meeting. J. Butler, *EEOC Memorandum Regarding PSFS Savings Bank, FSB v. Vinson*, 210 Daily Lab. Rep. (BNA) E-2 (Oct. 30, 1985). This latest controversy thus reflects a continued line of internal dispute and inconsistent interpretations, a clear indication that the

guidelines were improperly relied upon by the court below.[9]

In addition, several commentators have argued that the underlying reasoning behind the guidelines is invalid and unpersuasive. One analysis, for example, contends that an employer's potential strict liability for the conduct of an agent is clearly "harsh and undeserved." R. Conte and D. Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability*, 32 Drake L.Rev. 407, 435 (1982-83). Before the decision below, the commentators called for the amendment and removal of such liability, stating:

> The courts have thus far wisely refrained from applying the Guidelines' strict liability standard in an unthinking fashion. Both Congress and the EEOC have thus been afforded valuable time to reconsider the *internal inconsistency, the non-viability, and the debilitating influence of the strict standard* of employer liability for the actions of its supervisory agents in all cases.

Id. at 410 (footnote omitted) (emphasis added).

More importantly, the underlying reasoning behind the guidelines is unpersuasive precisely because of the result below. Here an employer is converted into an insurer for a supervisor's actions outside the scope of his employment, of which the employer had no actual or constructive notice, even though it had undertaken reasonable measures to prevent, detect, and halt such conduct. *See Ferguson*, 560 F. Supp. at 1198-99. Thus, not only should this Court reject the lower court's interpretation of the guidelines regarding vicarious liability because they are internally inconsistent, unpersuasive and unworthy of deference, but it should reverse the lower court's rule in its entirety.

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[9] In fact, EEOC Vice Chairman Cathie Shattuck expressed concern in 1982 regarding the strict liability standards apparently imposed by the guidelines. *EEOC Commissioner on Civil Rights Dialogue*, 110 Lab. Rel. Rep. (BNA) 270, 271 (1982).

II. THIS COURT SHOULD ADOPT STANDARDS IN SEXUAL HARASSMENT CASES PERMITTING A SUPERVISOR TO REBUT A PLAINTIFF'S CHARGES AND AN EMPLOYER TO DEFEND ITSELF FROM LIABILITY FOR CONDUCT IT HAS TAKEN REASONABLE STEPS TO PREVENT

This Court is urged to adopt a six-part test, five elements of which a plaintiff must allege and prove to establish a prima facie case of sexual harassment involving hostile work environment, and one element which an employer may use to defend its actions.[10] Four elements which are a subject of the instant case are set out and explained below. Essentially, the test would involve a trial court analysis which would consider issues such as consent, credibility, actual or constructive knowledge, and an employer's attempt at discouraging, recognizing and halting harassment.

A. The Standard Should Require Proof That The Conduct Was Unwelcome

The EEOC guidelines define the type of conduct that may constitute sexual harassment: "sexual advances, re-

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[10] The first element, that an employee is a member of a protected group, requires a simple stipulation that plaintiff is either a man or woman. *See Henson*, 682 F.2d at 903. The second element, that the harassment complained of was based upon sex, is not a subject of this case. Briefly, however, a disparate treatment claim under Title VII involves whether an employee or applicant is intentionally singled out for adverse treatment on the basis of a prohibited criterion. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *Teamsters*, 431 U.S. at 335 n.15; *Lee v. Conecuh County Bd. of Education*, 634 F.2d 959, 961-61 & n.3 (5th Cir. 1981). In proving a sexual harassment claim for a hostile work environment, therefore, the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment. *See Bundy*, 641 F.2d at 942-43 (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Tomkins*, 568 F.2d at 1047 n.4; Note, *Sexual Harassment and Title VII*, 76 U. Mich. L. Rev. 1007, 1019-20 & n.94 (1978) (citing *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976).

quests for sexual favors, and other verbal or physical conduct of a sexual nature . . . ." 29 C.F.R. § 1604.11(a) (1981). *See also EEOC Decision No. 81-18*, 27 Fair Empl. Prac. Cas. (BNA) 1793, 1802-05 (1981). In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that "the employee regarded the conduct as undesirable or offensive," or considered the "working conditions [to be] personally intolerable." *Henson*, 682 F.2d at 903; *Gan*, 28 Fair Empl. Prac. Cas. (BNA) at 641; 29 C.F.R. § 1604.11(a) (only unwelcome sexual advances generate Title VII liability); 61 B.U.L. Rev. at 561 ("[w]hether the advances are unwelcome . . . becomes an evidentiary question well within the courts' ability to resolve"). This standard necessarily would involve a credibility determination by the lower court regarding whether the plaintiff consented to or initiated the conduct, *see EEOC Decision No. 84-1*, 33 Fair Empl. Prac. Cas. (BNA) 1887 (1983), and whether the charges have been brought for ulterior motives.

B. The Standard Should Require That The Conduct Affected A Term, Condition Or Privilege Of Employment

Casual, isolated or trival manifestations of a discriminatory environment do not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII. *Glasgow v. Georgia Pacific Corp.*, 693 P.2d 708, 712 (Wash. 1985). For sexual harassment to state a claim under Title VII, "it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson*, 682 F.2d at 904. Whether sexual harassment at the workplace is "sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances." *Id.*; 29 C.F.R. § 1604.11(b)

(1981); *see Downes v. FAA*, 39 Fair Empl. Prac. Cas. (BNA) 70 (Fed. Cir. 1985); *Calcote*, 458 F. Supp. at 237; *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158-61 (S.D. Ohio 1976).

C. The Standard Should Hold An Employer Responsible For A Supervisor's Harassment Only Where The Employer Knew Or Should Have Known Of The Action, And Failed To Remedy It

To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee should show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. *Glasgow*, 693 P.2d at 712; *Henson*, 680 F.2d at 905; *Wimberly*, 39 Fair Empl. Prac. Cas. (BNA) at 453. *See, e.g., Barrett*, 726 F.2d 424; *Bundy*, 641 F.2d at 943. This may be shown by proving: (a) that complaints were made to the employer through higher managerial or supervisory personnel, or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment. *Glasgow*, 693 P.2d at 712; *see, e.g., Katz*, 709 F.2d 251; *Henson*, 682 F.2d at 905; *Taylor*, 653 F.2d at 1199.

D. The Standard Should Permit An Employer To Defend Its Actions Where It Lacked Actual Or Constructive Notice And Undertook Reasonable Preventative Measures

Where the employer did not know, either actually or constructively, of the supervisor's or co-worker's behavior, and was thus unable to provide corrective action, the employer should be able to defend itself from liability by establishing that it undertook reasonable measures to prevent and detect sexual harassment. The reasonableness of these measures should be judged according to the

particular circumstances, but could include whether an employer: (1) developed a strong policy prohibiting harassment, *see* 29 C.F.R. § 1604.11(f); (2) developed a procedure for reporting harassment and filing a charge, *see* 97 Harv. L. Rev. at 1462; (3) adopted strong, but appropriate sanctions, *see, e.g., Bundy*, 641 F.2d at 947; (4) published and distributed copies of the procedures and sanctions, *see* 29 Prac. Law at 32; (5) screened and chose supervisors who would not abuse their discretion, *see* 46 Ala. Law. at 179; or (6) trained supervisors and employees how to raise the issue and why the employer disapproves of harassment, *see* B. Schlei and P. Grossman at 429 n.265.

The proposed standard will further the end desired by the parties to this case and EEAC's member companies generally: the establishment of practical means to prevent sexual harassment as far as possible. At the same time, the rule will encourage employers to detect unwelcome conduct and, through the enforcement of workplace policies and procedures, remedy those instances of substantiated harassment.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed.

Respectfuly submitted,

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BRIEF

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No. 84-1979

In the Supreme Court of the United States

OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB, PETITIONER

v.

MECHELLE VINSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether unwelcome sexual advances by a supervisor toward a subordinate female employee, which create an intimidating, hostile, or offensive working environment, constitute employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether the court of appeals erred in determining that respondent could show a violation of Title VII in this case, where the district court has found that any sexual relationship between respondent and her supervisor "was a voluntary one" and that finding was not clearly erroneous.

3. Whether an employer can be held strictly liable for an offensive working environment created by a supervisor's sexual advances, where the employer does not know of, and could not reasonably have known of, the supervisor's misconduct.

TABLE OF CONTENTS

	Page
Interest of the Amici Curiae	1
Statement	1
Summary of argument	6
Discussion	7
A. Unwelcome sexual advances that create a hostile working environment violate Title VII	7
B. Employers should be liable under Title VII if they can be shown to have tolerated a sexually hostile working environment	20
Conclusion	30

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Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405	10
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	30
Anderson v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985)	6, 20
Anderson v. *Methodist Evangelical Hospital, Inc.*, 464 F.2d 723	23
Barnes v. *Costle*, 561 F.2d 983	12, 13, 23
Barrett v. *Omaha National Bank*, 726 F.2d 424	11
Bundy v. *Jackson*, 641 F.2d 934	4, 11, 12, 14, 20
Cariddi v. *Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87	12
City of Los Angeles v. *Lyons*, 461 U.S. 95	20
Compston v. *Borden, Inc.*, 424 F. Supp. 157	12
Continental Can Co. v. *State*, 297 N.W.2d 241	8
Craig v. *Y & Y Snacks, Inc.*, 721 F.2d 77	11, 15
Dean v. *Civiletti*, 670 F.2d 99	20
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Evans v. *Department of the Army*, No. 85-683 (Fed. Cir. May 23, 1985), cert. denied, No. 85-300 (Nov. 12, 1985)	9

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Flowers v. *Crouch-Walker Corp.*, 552 F.2d 1277 23
Gan v. *Kepro Circuit Systems*, 28 Fair Empl. Prac. Cas. (BNA) 639 ..... 14, 19
General Electric Co. v. *Gilbert*, 429 U.S. 125 10
Gray v. *Greyhound Lines*, 545 F.2d 169 11
Heelan v. *Johns-Manville Corp.*, 451 F. Supp. 1382 13
Henson v. *City of Dundee*, 682 F.2d 897 ..... 11, 12, 14, 20, 23, 24, 25
Holien v. *Sears, Roebuck & Co.*, 689 P.2d 1292 8
Horn v. *Duke Homes*, 755 F.2d 599 11
Hostetter v. *United States*, 739 F.2d 983 9
Howard University v. *Best*, 484 A.2d 958 8
I.U.O.E. v. *Robbins & Myers, Inc.*, 429 U.S. 229 24
Joshi v. *Florida State University*, 646 F.2d 981, cert. denied, 456 U.S. 972 20
Katz v. *Dole*, 709 F.2d 251 ..... 11, 12, 14, 20, 24
Lucas v. *Brown & Root, Inc.*, 736 F.2d 1202 8
Monge v. *Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 8
Phillips v. *Plaquemines Parish School Board*, 465 So.2d 53 9
Phillips v. *Smalley Maintenance Systems, Inc.*, 711 F.2d 1524 8
Rabidue v. *Osceola Refining Co.*, 584 F. Supp. 419 14
Rogers v. *EEOC*, 454 F.2d 234, cert. denied, 406 U.S. 957 11
Scott v. *Sears, Roebuck & Co.*, 605 F. Supp. 1047 14
Sears, Roebuck & Co. v. *Florida Unemployment Appeals Comm'n*, 463 So.2d 465 9
Snipes v. *United States Postal Service*, 6 M.S.P.B. 16 9
State ex rel. Miller v. *Richardson*, 229 Kan. 234, 623 P.2d 1317 9
Stewart v. *Thomas*, 538 F. Supp. 891 8
Taylor v. *Jones*, 653 F.2d 1193 24

Cases—Continued: Page

Tidwell v. *American Oil Co.*, 332 F. Supp. 424 23
United States v. *City of Buffalo*, 457 F. Supp. 612 11-12
Weiss v. *United States*, 595 F. Supp. 1050 12

Statutes, regulations and rule:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1
42 U.S.C. 2000e(b) 5, 22
42 U.S.C. 2000e-2(a)(1) 6, 9
42 U.S.C. 2000e-3(a) 28
42 U.S.C. 2000e-5(b) 22, 24
42 U.S.C. 2000e-5(e) 24
42 U.S.C. 2000e-5(f)(1) 1
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 *et seq.* 9
Cal. Gov't Code § 12940(j) (West Supp. 1985) 8
Mich. Comp. Laws. Ann. § 37.2103(h) (1985) 8
Wis. Stat. § 111.36 (1985) 8
Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11 *et seq.* 10
Section 1604.11(a) 10, 13
Section 1604.11(a)(1) 10
Section 1604.11(a)(2) 10
Section 1604.11(a)(3) 10, 15
Section 1604.11(b) 15, 17, 19
Section 1604.11(c) 21, 27
Section 1604.11(d) 28
Section 1604.11(e) 28
Section 1604.11(f) 28
Fed. R. Civ. P. 52(a) 6, 15

Miscellaneous:

110 Cong. Rec. 2577 (1964) 9
R. Conte & D. Gregory, *Sexual Harassment—Some Proposals Toward More Realistic Standards of Liability*, 32 Drake L. Rev. 407 (1982-1983) 17
1973 Empl. Prac. Dec. (CCH):
¶ 6193 (1970) 12
¶ 6216 (1971) 12
¶ 6347 (1972) 12
¶ 6354 (1972) 12

Miscellaneous—Continued: Page

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¶ 6758 (1981) 14
¶ 6818 (1982) 14
¶ 6832 (1982) 18
2 Empl. Prac. Guide (CCH) ¶ 6839 (Nov. 28, 1983) 19
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S. Rep. 92-415, 92d Cong., 1st Sess. (1971) 10
C. Whalen & B. Whalen, *The Longest Debate* (1982) 9

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INTEREST OF THE AMICI CURIAE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment because of a person's sex. The Equal Employment Opportunity Commission (EEOC) is the agency established by Congress to interpret and enforce Title VII. The Attorney General is responsible for the judicial enforcement of Title VII in cases where the employer is a government, a governmental agency, or a political subdivision. 42 U.S.C. 2000e-5(f)(1). The United States, in its capacity as employer and otherwise, has a strong interest in ensuring the fair and balanced enforcement of the federal civil rights laws.

STATEMENT

1. In September 1974 respondent Mechelle Vinson met Sidney Taylor, an assistant vice president of petitioner Meritor Savings Bank and manager of one of the bank's

branch offices (Pet. App. 30a-31a). She inquired whether she might obtain employment at the bank (*id.* at 31a). Taylor gave her an application form, which she completed and returned the next day. Later that same afternoon, Taylor called Vinson to tell her that she had been hired (*ibid.*).

Working under Taylor's supervision, Vinson progressed to the positions of teller, head teller, and assistant branch manager (Pet. App. 30a-31a). She achieved her promotions based solely on her merits (*id.* at 31a). She received all the usual and customary increases in salary, bonuses, and promotions, solely on the basis of merit (*id.* at 42a). She was twice offered promotions that would have entailed transfer to other branches of the bank, but she rejected those offers (*id.* at 43a).

In June 1978 Taylor notified Vinson that she had taken an excessive number of "sick days" and suggested that she "work towards correcting" the situation (Plaintiff's C.A. App. 104). On September 21, 1978, Vinson failed to report for work and notified Taylor that she would be on sick leave "indefinite[ly]" (Pet. App. 31a, 43a). On November 1, 1978, the bank terminated Vinson's employment because of her excessive use of sick leave (*id.* at 3a, 31a, 43a).

On September 22, 1978, the day after commencing sick leave, Vinson brought this action against Taylor and the bank (Pet. App. 34a). She alleged that during her four-year tenure at the bank she had "constantly been subjected to sexual harassment" by Taylor, who allegedly "sought sexual favors * * * from [her] as an inducement for retaining her employment" (Plaintiff's C.A. App. 11). She alleged that Taylor had forced her to have sexual intercourse with him and had threatened to fire her if she refused (*ibid.*). She alleged that Taylor's conduct violated, inter alia, Title VII. She sought injunctive relief, $200,000 in compensatory and punitive damages against Taylor and the bank, and attorney's fees (*id.* at 12; see Pet. App. 30a).

An eleven-day bench trial was held, at which conflicting testimony was presented. The district court found that Vinson "was not required to grant Taylor * * * sexual favors as a condition of * * * her employment" and that "her promotions and advancements * * * did not result from her rendering sexual favors to Taylor" but rather were "based on merit alone" (Pet. App. 42a). The court did not resolve the conflicting testimony about the existence of a sexual relationship between Vinson and Taylor. It found, however, that "[i]f [Vinson] and Taylor did engage in an intimate or sexual relationship * * * that relationship was a voluntary one by [Vinson] having nothing to do with her continued employment * * * or her advancement" at the bank (*ibid.*). The court found that Vinson had been offered two opportunities to transfer to desirable jobs at other branches of the bank, and thus to escape Taylor's alleged harassment, but had declined those offers (*id.* at 43a). The court found that Vinson had not reported Taylor's alleged rapes to the police, had not reported his alleged sexual advances to any officials of the bank, and had not, before commencing her lawsuit, filed a charge with the EEOC alleging sexual harassment (*id.* at 42a-43a). The court credited Taylor's testimony that he and Vinson had clashed over his training instructions concerning another employee "[i]n late summer or early September [of] 1978," shortly before Vinson took indefinite sick leave (*id.* at 43a-44a). The court ultimately found that Vinson "was not the victim of sexual harassment and was not the victim of sexual discrimination while employed" by the bank (*id.* at 44a).

Although the district court concluded that Vinson had not proved a violation of Title VII, it nevertheless proceeded to address the question of the bank's liability. It found that the bank had an express policy against discrimination and an internal grievance procedure (Pet. App. 41a, 43a), and it found that neither Vinson nor any other employee had ever lodged a complaint about

sexual harassment by Taylor (*id.* at 43a-44a). The court found that Vinson's raises, bonuses, and promotions were determined by officials other than Taylor, and that Taylor could only make "written recommendations" regarding personnel actions (*id.* at 40a, 43a). The court found that there was "no evidence" as to whether Taylor's title as assistant vice president was "honorary or whether [it] confer[red] upon [him] some greater responsibility and relationship to the management of the bank" (*id.* at 41a). The court ultimately found that "the bank was without notice and cannot be held liable for the alleged actions of Taylor" (*ibid.*).

2. The court of appeals reversed (Pet. App. 1a-21a). It recited that it had "[g]iven due deference to the [district] court's findings of fact," but disagreed with that court's "legal conclusion that Vinson did not suffer a violation" of Title VII (Pet. App. 6a). The court of appeals reiterated its holding in *Bundy* v. *Jackson*, 641 F.2d 934 (1981), that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits, such as raises or promotions, on sexual favors (often called "quid pro quo" harassment), and harassment that, while involving no effects on economic benefits, creates a hostile or offensive working environment (Pet. App. 6a). Although Vinson's complaint had specifically linked Taylor's alleged harassment to threats of discharge (Plaintiff's C.A. App. 11), the court of appeals expressed the view that "Vinson's grievance was clearly of the [hostile environment] type" (Pet. App. 7a). Because the district court had not explicitly considered the possibility that Taylor's alleged sexual advances had created a hostile environment, the court of appeals held that a remand was necessary (*id.* at 7a-8a).

The court of appeals concluded that the district court's finding that any sexual relationship between Vinson and Taylor "was a voluntary one" did not obviate the need for a remand. The court of appeals was "uncertain as to precisely what the [district] court meant" by this

finding (Pet. App. 8a). If the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," the court said, Vinson's voluntariness "had no materiality whatsoever" (*id.* at 9a, 10a). The court surmised that the district court, in making its finding of voluntariness, "may have considered the voluminous testimony regarding Vinson's dress and personal fantasies," testimony that in the court of appeals' view "had no place in this litigation" (*id.* at 9a n.36).

On the issue of the bank's liability, the court of appeals held that an employer is absolutely liable for sexual harassment practiced by a supervisory employee, regardless of whether the employer actually knew or should have known about the misconduct (Pet. App. 10a-20a). In so ruling, the court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person" (*id.* at 13a, quoting 42 U.S.C. 2000e(b)). The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote employees, since "even the appearance * * * of a significant degree of influence in vital job decisions gives any supervisor the opportunity" to take sexual advantage of subordinates (Pet. App. 17a-18a).

The employer's petition for rehearing en banc was denied, with Judges Bork, Scalia and Starr dissenting (Pet. App. 22a-29a). The dissenting judges expressed concern that the panel's holding about "voluntariness" would enable plaintiffs to turn consensual "sexual dalliances" into Title VII violations, simply by characterizing them as "harassment" after the fact (*id.* at 23a-24a). The dissent argued that the combined effect of that holding and the panel's holding on vicarious liability would be to make the employer "an insurer that all relationships between supervisors and employees are entirely asexual," thus impelling employers to police in unseemly fashion their workers' personal affairs (*id.* at 25a-26a).

The dissent likewise faulted the panel's ruling that an employer cannot introduce "evidence of an employee's dress or behavior in an effort to prove that any sexual advances were solicited or welcomed" (*id.* at 24a). The dissent noted the absence of any authority for that ruling, and contended that the panel's evidentiary rulings, when "[a]dded to the elimination of any voluntariness defense, * * * make certain that to be charged is to be guilty" (*id.* at 24a-25a).

SUMMARY OF ARGUMENT

We agree with the court of appeals that proof of a sexually hostile work environment establishes discrimination "because of * * * sex" (42 U.S.C. 2000e-2(a)(1)) in violation of Title VII. The court of appeals erred, however, in reversing the district court's determination that respondent failed to prove her case here. While unwelcome sexual advances may create a hostile work environment, consensual sexual relationships do not provide a basis for Title VII liability. The district court found that any sexual relationship between respondent and her supervisor "was a voluntary one" on her part (Pet. App. 42a) and that she "was not the victim of sexual harassment" (*id.* at 44a). These ultimate factual findings were grounded on reasonable credibility determinations and on findings of subsidiary fact that the court of appeals did not rule "clearly erroneous" (Fed. R. Civ. P. 52(a)). The court of appeals accordingly had no basis for reversing the district court's judgment and remanding for another trial. *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985).

Because respondent failed to prove a violation of Title VII against anyone, there is no need for this Court to consider the question of the bank's liability for its supervisor's alleged actions. If the Court should reach that question, however, it should reverse the judgment below. The court of appeals' theory of absolute employer liability is erroneous as a matter of statutory construction and ignores the special characteristics of "hostile

environment" claims. In our view, an employer should not be liable unless it knew or had reason to know of the sexually offensive atmosphere. An employer without actual knowledge will have "reason to know" of sexual misconduct at his workplace if victims of sexual harassment have no reasonably available means of bringing complaints to the employer's attention and seeking redress. Because it is unclear on this record whether an employee in Vinson's position had an effective means of complaint and redress, a remand would be necessary on this question. Whether a particular employer has "reason to know" about sexual misconduct may often involve difficult factual issues, but an employer in our view should generally be able to insulate itself from liability by publicizing a policy against sexual harassment and implementing a procedure designed to resolve sexual harassment complaints.

DISCUSSION

A. Unwelcome Sexual Advances That Create A Hostile Working Environment Violate Title VII

1. Sexual harassment in the workplace is a serious national problem of great concern to employers and employees alike. Typically, although not always, directed at women, sexual harassment may pose substantial barriers to the victim's professional advancement, and may create such indignities and such intolerable working conditions as to force a woman to abandon her job. There is evidence that the incidence of such behavior is unfortunately widespread, even where employers have taken strong measures to eliminate it. Besides imposing economic costs, sexual harassment is often founded on stereotypical views of women, and may, in whatever form it takes, inflict serious psychological, if not physical, hardships upon them.

The term "sexual harassment" is used in common parlance to denote a wide range of improper behavior in the workplace, behavior that may be engaged in by supervisors, co-workers, or non-employees. Sexual harassment may include physical conduct, such as unwel-

come touching or fondling, or may be limited to such verbal abuse as lewd or obscene comments, insults or denigration of women, or repeated unwelcome invitations to social or sexual activity. Sexual harassment may impose an unpleasant or intolerable working environment or may involve the coercion of sexual favors through the offer or threat of job-related benefits or detriments.

Although sexual harassment is undoubtedly a phenomenon with a long history, it has only recently been generally acknowledged as a serious social and legal problem. The responses to the problem, at both the state and the federal levels, have taken several forms. Some states have adopted specific statutory protections for the victims of sexual harassment,[1] or have interpreted their own civil rights laws to include sexual harassment as a form of prohibited sex discrimination.[2] In states that have abandoned the traditional doctrine of employment at will, some courts have recognized dismissals based on sexual harassment as a form of wrongful discharge.[3] Numerous courts have found sexual harassment to be tortious, either on such traditional theories as assault and battery, or on such modern theories as intentional infliction of emotional distress.[4]

The United States, like many employers, has taken strong steps to eliminate sexual harassment in the work-

[1] See, *e.g.*, Cal. Gov't Code § 12940(j) (West Supp. 1985); Mich. Comp. Laws Ann. § 37.2103(h) (1985); Wis. Stat. § 111.36 (1985).

[2] See, *e.g.*, *Continental Can Co.* v. *State*, 297 N.W.2d 241, 246-249 (Minn. 1980); *Howard University* v. *Best*, 484 A.2d 958 (D.C. App. 1984); *Holien* v. *Sears, Roebuck & Co.*, 689 P.2d 1292 (Or. 1984).

[3] See, *e.g.*, *Monge* v. *Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Holien* v. *Sears, Roebuck & Co.*, 689 P.2d at 1294.

[4] *E.g.*, *Lucas* v. *Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984); *Phillips* v. *Smalley Maintenance Systems, Inc.*, 711 F.2d 1524 (11th Cir. 1983); *Stewart* v. *Thomas*, 538 F. Supp. 891 (D.D.C. 1982). See generally Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 Golden Gate U.L. Rev. 879 (1980) (discussing available tort remedies).

place. Stern disciplinary measures, including discharge or demotion, are imposed on federal supervisory employees found to have sexually harassed subordinates. See *Hostetter* v. *United States*, 739 F.2d 983 (4th Cir. 1984); *Evans* v. *Department of the Army*, No. 85-683 (Fed. Cir. May 23, 1985), cert. denied, No. 85-300 (Nov. 12, 1985). The Merit Systems Protection Board has recognized that a federal agency "has an obligation to its employees to create and maintain a work environment free of sexual harassment." *Snipes* v. *United States Postal Service*, 6 M.S.P.B. 16, 17 (1981). Other governmental and private employers have likewise made sexual harassment by supervisors a ground for dismissal.[5]

2. Title VII of the Civil Rights Act makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex" (42 U.S.C. 2000e-2(a)(1)).[6] In

[5] See *State ex rel. Miller* v. *Richardson*, 229 Kan. 234, 623 P.2d 1317 (1981) (statutory ouster of public official); *Edwards* v. *Florida Department of Highway Safety*, 470 So.2d 9 (Fla. Dist. Ct. App. 1985) (discharge of public official); *Phillips* v. *Plaquemines Parish School Board*, 465 So.2d 53 (La. App. 1985) (same); *Sears, Roebuck & Co.* v. *Florida Unemployment Appeals Comm'n*, 463 So.2d 465 (Fla. Dist. Ct. App. 1985) (denial of unemployment benefits to former supervisor discharged by a private employer for practicing sexual harassment).

[6] The legislative history of the 1964 Act sheds little light on the meaning of this terminology, since the word "sex" was added to the bill at the last minute by its opponents on the House floor in an effort to prevent its passage. See 110 Cong. Rec. 2577 (1964) (remarks of Rep. Smith); *id.* at 2581-2582 (remarks of Rep. Green). See generally C. Whalen & B. Whalen, *The Longest Debate* 115-121 (1982). However, in amending the 1964 Act by passage of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 *et seq.*, Congress spoke more fully regarding the prohibition against sex discrimination. While not specifically addressing sexual harassment, the committee reports emphasize that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimina-

1980, the EEOC issued guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. See *Guidelines on Discrimination Because of Sex*, 29 C.F.R. 1604.11 *et seq.* As an "administrative interpretation of the [Civil Rights] Act by the enforcing agency," these guidelines are "entitled to great deference." Compare *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975), with *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-156 (1976).

In defining actionable "sexual harassment," the EEOC guidelines first describe the types of workplace sexual misconduct that may, under certain circumstances, violate Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" (29 C.F.R. 1604.11 (a)). As they apply to the charges at issue in this case, the guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly tied to the grant or denial of an economic quid pro quo, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (29 C.F.R. 1604.11 (a) (3)).[7]

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tion." H.R. Rep. 92-238, 92d Cong., 1st Sess. 4-5 (1971); S. Rep. 92-415, 92d Cong., 1st Sess. 7-8 (1971).

[7] The EEOC guidelines also provide that sexual misconduct at the workplace constitutes prohibited "sexual harassment" where "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment" and where "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual" (29 C.F.R. 1604.11(a)(1) and (2)). This type of sexual harassment is commonly referred to as "quid pro quo" harassment. The issue of "quid pro quo" harassment is not presented here because the district court found (Pet. App. 42a-43a), and the court of appeals did not disagree (see *id.* at 6a-7a), that Vinson achieved all her promotions based solely on merit, and that Taylor's alleged conduct had no effect on the salary, bonuses, and other economic terms and conditions of employment that Vinson received. The courts of appeals have held various manifestations of "quid pro quo" sexual

In determining that "hostile environment" harassment violates Title VII, the Commission drew upon a long line of judicial decisions and EEOC precedents holding that Title VII grants employees the right to a workplace free of discriminatory intimidation, ridicule, and insult. A cause of action based on a discriminatory work environment was first recognized in *Rogers* v. *EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), where it was held that an Hispanic plaintiff established a Title VII violation by demonstrating that her employer created an offensive working atmosphere for employees by giving discriminatory service to its Hispanic patrons. As the Fifth Circuit explained (454 F.2d at 238):

> [T]he phrase "terms, conditions, or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. * * * One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers * * *.

The courts and the EEOC have regularly applied the same principle to find Title VII violations where hostile working environments are created by discrimination based on race,[8]

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harassment to be violations of Title VII. See, *e.g.*, *Bundy* v. *Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Craig* v. *Y & Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983); *Katz* v. *Dole*, 709 F.2d 251 (4th Cir. 1983); *Horn* v. *Duke Homes*, 755 F.2d 599 (7th Cir. 1985); *Barrett* v. *Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984); *Henson* v. *City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

[8] *E.g.*, *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F.2d 506, 514-515 (8th Cir.), cert. denied, 434 U.S. 819 (1977) (racially segregated employee eating clubs condoned by employer violate Title VII by creating a discriminatory work environment); *Gray* v. *Greyhound Lines*, 545 F.2d 169, 176 (D.C. Cir. 1976) (pattern of racial slurs violates Title VII by creating a discriminatory work environment); *United States* v. *City of Buffalo*,

religion,[9] or national origin.[10]

With equal unanimity, the courts have held, consistently with the EEOC guidelines, that a plaintiff may establish a violation of Title VII by demonstrating the existence of a hostile work environment caused by discrimination based on sex. As the Eleventh Circuit wrote in *Henson* v. *City of Dundee*, 682 F.2d 897, 902 (1982):

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

The Fourth and District of Columbia Circuits have reached the same result for substantially the same reasons. *Katz* v. *Dole*, 709 F.2d 251, 254-255 (4th Cir. 1983); *Bundy* v. *Jackson*, 641 F.2d 934, 943-944 (D.C. Cir. 1981).

While holding that claims of sexual harassment may state a cause of action under Title VII, the EEOC and

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457 F. Supp. 612, 631-635 (W.D. N.Y. 1978) (holding that black employees are entitled to a work environment free of racial abuse and insult); 1973 Empl. Prac. Dec. (CCH) ¶ 6193 (1970) (discharge for interracial association violates Title VII); *id.* ¶ 6216 (1971) (pattern of insulting racial remarks violates Title VII).

[9] *E.g.*, *Weiss* v. *United States*, 595 F. Supp. 1050 (E.D. Va. 1984) (anti-Semitic verbal abuse of an employee violated his Title VII right to a nondiscriminatory working environment); *Compston* v. *Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (demeaning religious slurs by supervisor violated Title VII); 1973 Empl. Prac. Dec. (CCH) ¶ 6347 (1972) (religious preaching that created an environment of religious intimidation violated Title VII).

[10] *E.g.*, *Cariddi* v. *Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (indicating that a pattern of offensive ethnic slurs would violate Title VII); 1973 Empl. Prac. Dec. (CCH) ¶ 6354 (1972) (pattern of racial and ethnic slurs, also appearing on restroom walls, violates Title VII).

the lower courts have also recognized that such claims, particularly when they fall in the "hostile environment" category, are distinct in Title VII jurisprudence, both in their theoretical formulation and in the practical problems that they pose. Sexual attraction is a fact of life, and it may often play a role in the day-to-day social exchange between employees in the workplace. For this reason, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected sexual advances" is not always easy to discern. *Barnes* v. *Costle*, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J., concurring). Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous. Sexual liaisons between employees, for obvious reasons, are likely to be private and unacknowledged. Determinations as to their nature—indeed, as to their existence—will thus often depend "largely upon the [trial] court's view of the credibility of the witnesses." *Heelan* v. *Johns-Manville Corp.*, 451 F. Supp. 1382, 1385 (D. Colo. 1978). And because "no policy can be derived from the equal employment opportunity laws to discourage" sexual relationships between consenting co-workers (*Barnes* v. *Costle*, 561 F.2d at 1001 (MacKinnon, J., concurring)), it is essential to craft Title VII rules in such a way that they do not intrude on "purely personal, social relationship[s]." *Preamble to Interim Guidelines on Sex Discrimination*, 45 Fed. Reg. 25024 (1980).

Because of the important interests at stake in defining the boundaries of unlawful sexual harassment, the EEOC, the courts, and the commentators have correctly emphasized several principles to guide the disposition of such charges. The gravamen of any hostile environment claim must be that the alleged sexual advances are "unwelcome" (29 C.F.R. 1604.11(a)). In weighing such allegations, the trier of fact must determine whether the defendant's

conduct was indeed unwelcome in light of all the circumstances, including evidence that the plaintiff substantially contributed to the allegedly distasteful atmosphere by his or her own "sexually suggestive conduct." *Gan* v. *Kepro Circuit Systems*, 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1982). See, *e.g.*, *Evans* v. *Mail Handlers*, 32 Fair Empl. Prac. Cas. (BNA) 634, 637 (D.D.C. 1983) (plaintiff welcomed sexual advances and thus failed to establish prima facie case). The unwelcome conduct, moreover, must be sufficiently severe or pervasive as to affect the general working environment of the complaining worker and thus to be properly characterized as a "term or condition of employment" (*Henson* v. *City of Dundee*, 682 F.2d at 904). Sexual flirtation or innuendo, even vulgar language that is "trivial or merely annoying," does not necessarily establish a sexually hostile environment (*Rabidue* v. *Osceola Refining Co.*, 584 F. Supp. 419, 433 (E.D. Mich. 1984)). Rather, the conduct complained of must be such that it illegally poisons the atmosphere (*Katz* v. *Dole*, 709 F.2d at 255), and does so from the viewpoint of the reasonable victim (*Henson* v. *City of Dundee*, 682 F.2d at 904).[11] The question whether a pattern of activity constitutes illegal sexual harassment, or rather "establishes a purely personal, social relationship without discriminatory employment effects," necessarily "requires a factual determination" (*Preamble to Interim Guidelines on Sex Discrimination*, 45 Fed. Reg. 25024 (1980)). The EEOC guidelines accordingly emphasize the need for a careful review of "the record as a whole and * * * the totality of the circumstances, such as the nature of the sexual advances,

[11] Compare, *e.g.*, *Bundy* v. *Jackson*, 641 F.2d at 940 (finding a violation where female employee complained about supervisor's sexual advances to a higher official, who replied that "any man in his right mind would want to rape you"), and 1983 Empl. Prac. Dec. (CCH) ¶ 6758 (1981), with *Scott* v. *Sears, Roebuck & Co.*, 605 F. Supp. 1047, 1055-1056 (N.D. Ill. 1985) (finding no violation where plaintiff's perception of flirtations as sexual "propositions" was objectively unreasonable), and 1983 Empl. Prac. Dec. (CCH) ¶ 6818 (1982).

and the context in which the alleged incidents occurred" (29 C.F.R. 1604.11(b)). Finally, because claims of sexual harassment almost invariably involve "serious credibility issues" (*Craig* v. *Y & Y Snacks*, 721 F.2d at 79), special deference should be paid to the findings of the trier of fact.

3. We agree with the court of appeals below, and with the uniform conclusion of the EEOC and the other appellate courts that have considered the question, that sexual harassment which "has the purpose or effect of * * * creating an intimidating, hostile, or offensive working environment" (29 C.F.R. 1604.11(a)(3)) constitutes discrimination because of sex in violation of Title VII. It follows both from the language of the statute and from strong considerations of legislative policy that an employer violates Title VII when he knowingly permits sexual harassment to pollute an employee's working environment.

Although we agree that allegations of a sexually hostile working environment state a cause of action under Title VII, we believe that the court of appeals erred in reversing the district court's conclusion that Vinson failed to prove a violation of Title VII based on the evidence adduced at trial. The district court's findings of fact, which the court of appeals did not hold "clearly erroneous" (Fed. R. Civ. P. 52(a); see Pet. App. 6a & n.23), unambiguously show that Vinson failed to prove "sexual harassment" of any sort to the satisfaction of the district judge. Indeed, the district court's findings show appropriate sensitivity to the need to ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other. As we have noted (see pages 13-15, *supra*), litigation about sexual harassment presents difficult problems of proof and involves serious credibility issues, considerations that warrant special deference to the reasoned conclusions of the trier of fact. In its insensitivity to these concerns, the court of appeals appears to have endorsed a view of sexual harassment that would allow Title VII actions to be based on purely personal and

consensual relationships between co-workers. Such an approach not only would unfairly subject employers to liability for an ill-defined class of activities, but would intrude improperly and unnecessarily upon the privacy of the individuals involved in such relationships.

The district court found as a fact that Vinson "received the usual and customary increases in salary, Christmas bonuses, and promotions on the basis of merit," that her advancements "did not result from her rendering sexual favors to Taylor," and that she "was not required to grant Taylor * * * sexual favors as a condition of * * * her employment" (Pet. App. 42a). As the court of appeals evidently realized (*id.* at 6a-7a), these findings completely disposed of any "quid pro quo" claim. Indeed, these findings directly refuted the principal allegations of Vinson's complaint—that Taylor "sought sexual favors * * * as an inducement for retaining her employment" and that Taylor "ha[d] forced [her] to have sexual intercourse with him using the threat that if she refused she would be terminated" from her job (Plaintiff's C.A. App. 11).

Although the district court did not make explicit findings as to the sexual neutrality or hostility of Vinson's working environment—quite possibly because her complaint, contrary to the court of appeals' assertion (Pet. App. 7a), proffered in essence a "quid pro quo" claim—the trial court did find that any sexual relationship between Vinson and Taylor "was a voluntary one" on her part (*id.* at 42a) and that she "was not the victim of sexual harassment" during her four-year tenure at the bank (*id.* at 44a). While these findings would seem on their face likewise to dispose of any "hostile environment" claim, the court of appeals professed to be "uncertain as to precisely what the district court meant" by these findings (*id.* at 8a), a profession that was followed (*id.* at 9a-10a) by an elaborate exegesis upon the ambiguity of the word "voluntary."

This was error. A determination as to the existence of sexual harassment requires a careful review of "the record as a whole and * * * the totality of the circumstances" (29 C.F.R. 1604.11(b)). Consideration of the district court's ultimate findings in light of the record as a whole permit only one conclusion: the trial judge meant exactly what he said—that Vinson's participation in any sexual relationship with Taylor was consensual and "voluntary," that Taylor's advances (if any) were not unwelcome, and that Vinson accordingly failed to prove that she was "the victim of sexual harassment."

The district court held an eleven-day trial at which both Vinson and Taylor testified. The court's findings make clear that in critical respects it believed Taylor's testimony (*e.g.*, his testimony that Vinson's charges may have stemmed from work-related disputes) and did not believe Vinson's (*e.g.*, her testimony that Taylor had threatened to have her fired if she refused to grant him sex). See Pet. App. 42a-43a. The trial established, moreover, that Vinson's charges of sexual harassment had absolutely no evidentiary support beyond her own bare allegations. Sociological and medical studies have shown that sexual harassment far less extreme than that which Vinson alleged—repeated rapes and assaults over a two-year period—often has severely debilitating effects, both physical and psychological, upon its victims. See, *e.g.*, Note, *Employer Liability for Co-Worker Sexual Harassment under Title VII*, 13 N.Y. U. Rev. of Law and Social Change 83, 84-85 n.6 (1984-1985) (citing authorities); R. Conte & D. Gregory, *Sexual Harassment—Some Proposals Toward More Realistic Standards of Liability*, 32 Drake L. Rev. 407, 418 n.47 (1982-1983). Yet Vinson did not produce a single witness who could testify to having encountered any evidence of Taylor's harassment of Vinson, either by witnessing his conduct, by hearing Vinson complain about it, or by noting its adverse effects on her demeanor. Indeed, one of Vinson's co-workers, who testified that "she thought there was a relationship between [Vinson] and Taylor," also testified that Vinson "did not appear to be afraid of Taylor" (Pet. App. 42a n.7), testimony obviously at odds with

Vinson's charges of repeated rape. The EEOC in similar circumstances has held that a "bare assertion" of sexual harassment "cannot stand without some factual support." 1983 Empl. Prac. Dec. (CCH) ¶ 6832 (1982).

The district court's findings of subsidiary fact, when added to its credibility determinations, amply support its conclusion that Vinson "was not the victim of sexual harassment" (Pet. App. 44a). The court found that Vinson did not report Taylor's alleged rapes to the police and did not file an EEOC charge alleging sexual harassment by Taylor until after this lawsuit had begun (*id.* at 42a). Indeed, the record is devoid of evidence that Vinson mentioned Taylor's alleged activities to anyone, whether to co-workers, family, or friends. The district court found that Vinson had twice refused opportunities to transfer to desirable jobs at other branches of the bank and thus to escape Taylor's supervision—a pattern of decisionmaking difficult to reconcile with her charges of repeated sexual abuse (*id.* at 43a). As Vinson herself testified (*id.* at 32a), she did not file her lawsuit until nearly a year after the alleged harassment had ceased, and, as the district court found (*id.* at 43a), she filed it the day after she reported sick, in the wake of several work-related disputes with Taylor about her excessive use of sick leave and her refusal to follow Taylor's training instructions. When viewed in the context of the record as a whole, Vinson's long silence and her delay in asserting her claim well-nigh compelled the district court's findings either that no sexual activities took pace, or that, if any took place, Vinson's participation was consensual and voluntary.

In the course of impugning the district court's finding of "voluntariness," the court of appeals surmised (Pet. App. 9a n.36) that the district judge might have based that finding on "the voluminous testimony about Vinson's dress and personal fantasies." There was absolutely no basis for the court of appeals' inference. The district court made no mention whatever of the testimony about Vinson's dress and sexual fantasies, and, as we have

pointed out, the district court's finding of voluntariness was amply supported by its credibility determinations and its subsidiary findings of fact. In any event, the court of appeals cited no authority, and we know of none, for the proposition that testimony about a plaintiff's sexually provocative dress and publicly-expressed sexual fantasies "ha[s] no place in this [sort of] litigation" (*ibid.*). While it is of course true that "a woman does not waive her Title VII rights by her sartorial or whimsical proclivities" (*ibid.*), it does not necessarily follow that evidence of a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether that person finds particular sexual advances obnoxious or unwelcome. The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment "on a case by case basis," viewing "the record as a whole" and "the totality of the circumstances" (29 C.F.R. 1604.11(b)). The Commission in its decisions has held that an individual's "participating in sexual conduct in the workplace," *e.g.*, by "using dirty remarks and telling dirty jokes," may indicate that the sexual advances complained of are not "unwelcome." *E.g.*, 2 Empl. Prac. Guide (CCH) ¶ 6839, at 7014 (Nov. 28, 1983). The courts have likewise held that a complainant's sexual aggressiveness and sexually explicit conversations may be relevant in assessing a charge of harassment. *E.g.*, *Gan* v. *Kepro Circuit Systems*, 28 Fair Empl. Prac. Cas. (BNA) at 640. While evidence of this sort must obviously be used with care, there is no basis for creating a per se rule against its admissibility.

Claims of sexual harassment pose difficult and sensitive problems. In adjudicating such claims, it is essential that courts recognize and condemn a form of discrimination that can seriously limit employment opportunities for women, while avoiding unfair imposition of Title VII liability for consensual relationships that have taken a bad turn. The district court in this case properly analyzed the "totality of the circumstances" (29 C.F.R. 1604.11(b)) and concluded that Vinson was not the victim of sexual

harassment. The district court's findings of subsidiary fact were not clearly erroneous, as the court of appeals acknowledged (Pet. App. 6a & n.23), and there was no basis for setting aside the district court's ultimate factual finding. *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985). The court of appeals erred in doing so, and in remanding this case for further proceedings.[12]

B. Employers Should Be Liable Under Title VII If They Can Be Shown To Have Tolerated A Sexually Hostile Working Environment

Although the district court concluded that Vinson had not proved a violation of Title VII, it nevertheless proceeded to consider the question of the bank's liability. The court found that Taylor had no authority to hire, fire, or promote employees (Pet. App. 40a, 43a); that all employment decisions affecting Vinson were made by other bank officials (*ibid.*); that any sexual relationship

[12] Even if the court of appeals were correct in ordering a remand, it is not easy to see what relief the district court could award if it were to find a "hostile environment" after another trial. The district court has found, and the court of appeals has agreed, that Vinson was denied no work-related economic benefits by reason of Taylor's alleged harassment. Vinson is no longer employed by the bank, and the district court found that her employment was properly terminated for abusing the bank's sick-leave policy. Vinson failed to make a timely amendment of her complaint to allege discriminatory or constructive discharge, and, even if she were permitted to renew that motion on remand, it is by no means clear that such an allegation could survive the factual findings the district court has already made, not to mention Vinson's own testimony that the alleged harassment ceased almost a year before she left the bank's employ. Since Vinson is no longer subject to Taylor's supervision, but is complaining of a past wrong, injunctive relief would clearly be inappropriate. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983). Moreover, damages for such past injuries as emotional distress are unavailable under Title VII. See *Bundy* v. *Jackson*, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981). Vinson's complaint would thus seem to be moot in a practical sense. But see *Henson*, 682 F.2d at 905-906; *Katz*, 709 F.2d at 251 n.1; *Joshi* v. *Florida State University*, 646 F.2d 981, 991 n.33 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982); *Dean* v. *Civiletti*, 670 F.2d 99 (8th Cir. 1982).

between Vinson and Taylor "ha[d] nothing to do with her continued employment * * * or her advancements or promotions at [the bank]" (*id.* at 42a); that the bank had "an express policy * * * of nondiscrimination in employment practices" (*id.* at 43a); and that neither Vinson nor any other employee had complained to the bank of Taylor's alleged harassment, by utilizing the bank's grievance procedure or otherwise (*id.* at 41a, 43a). The district court ultimately found that "the bank was without notice" and hence could not properly be held liable for Taylor's alleged actions (*id.* at 41a).

The court of appeals reversed, holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knows of nor reasonably could have known of the alleged misconduct, and even though the employer would have disapproved of and stopped the misconduct if aware of it. The court held that a supervisor, even if he lacks authority to hire, fire, or promote, is nevertheless an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself sexually upon subordinates (Pet. App. 17a-18a). The court of appeals drew no distinction in this respect between "quid pro quo" and "hostile environment" cases, and expressed the view that the EEOC guidelines furnish "unambiguous" support for its strict-liability approach (*id.* at 15a, quoting 29 C.F.R. 1604.11(c)).

Since, in our view of the case, Vinson failed to prove a claim of sexual harassment against anyone, there is no need for this Court, any more than there was for the district court, to consider the question of the bank's liability. If the Court should reach this question, however, it should reverse the judgment of the court of appeals and remand the case for the district court to apply what we believe to be the proper standard for employer liability. The court of appeals' theory of strict employer liability in "hostile environment" cases such as this one is erroneous as a matter of statutory construction and com-

mon sense, and would seriously disserve the remedial purposes of Title VII.

Title VII prohibits discrimination by an employer, defined to include "any agent of such a person" (42 U.S.C. 2000e(b)). One of the fundamental principles of agency, as that term has traditionally been understood, is that a person who is another's agent for some purposes does not therefore act as the other's agent for all purposes. Rather, a principal's liability is limited to acts of the agent that are within the scope of the agent's employment. See W. Prosser & R. Keeton, *Law of Torts* 502 (1984); Restatement (Second) of Agency § 219(1) (1958). An agent's actions are generally viewed as being within the scope of his employment if they represent the exercise of authority actually vested in him, or of authority which third parties reasonably believe him to possess by virtue of his principal's conduct, generally called "apparent authority." See Restatement (Second) of Agency §§ 7, 8 (1958). While such common-law principles are not necessarily transferrable in all their particulars to Title VII, Congress's decision to use the term "agent," rather than such words as "subordinate" or "supervisory employee," surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

When a Title VII charge is based on allegations of sexual harassment, the question whether a supervisor is acting as his employer's agent should turn primarily on the scope of authority delegated to the supervisor and on the character of the actions alleged. It is well established under Title VII that a supervisor exercises the actual authority delegated to him by his employer when he makes, or threatens to make, decisions affecting the employment status of his subordinates. Such actions are, therefore, imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Thus, the courts have routinely held employers liable under Title VII for the discriminatory discharge of employees by supervisory personnel, regardless of whether

the employer knew, should have known, or approved of the supervisors' actions. *See, e.g., Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972) (racially motivated discharge "by a person in authority at a lower level of management" is attributable to employer despite upper management's "exemplary" record in race relations); *Tidwell* v. *American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971) (upper level management's lack of knowledge irrelevant where supervisor illegally discharged employee for refusing discriminatorily to disqualify black applicant). See also *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) ("The defendant is liable as principal for any violation of Title VII • • • by [a supervisor] in his authorized capacity as supervisor.").

Applying these principles, the EEOC guidelines provide that employers are likewise vicariously liable for sexual harassment practiced by supervisory personnel where the supervisor's actions are undertaken within the scope of authority delegated by the employer. In general, harassment which affects tangible job benefits and is manifested in a supervisory employment decision—that is, "quid pro quo" harassment—will give rise to vicarious liability under the guidelines. That is because the authority to make or substantially influence such decisions is within the scope of authority that the employer has delegated to the supervisor. Contra, *Barnes* v. *Costle*, 561 F.2d 983, 995 (D.C. Cir. 1976) (MacKinnon, J., concurring) (supervisor not acting within apparent scope of employment when he extorts sexual consideration from subordinate in exchange for favorable job action). In such cases, the supervisor has obviously "relie[d] upon his • • • actual authority to extort sexual consideration from an employee • • • [and has used] the means furnished to him by the employer to accomplish the prohibited purpose." *Henson* v. *City of Dundee*, 682 F.2d at 910.

Where a sexual harassment claim proceeds on a pure "hostile environment" theory, however, as Vinson's claim

now does, the usual basis for a finding of agency will often disappear. By definition, the supervisor in such circumstances is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim. Nor, except in unusual cases, could it be demonstrated that the employer had authorized the supervisor to engage in sexual harassment per se, or that the supervisor's sexually harassing conduct has furthered any business of his employer as principal.[13] In a pure "hostile environment" case, therefore, the usual bases for imputing the supervisor's actions to his employer may be lacking.

For this reason, the Fourth and Eleventh Circuits have held that an employer cannot be held absolutely liable, on a theory of vicarious liability, for a supervisor's creation of a working environment that is sexually offensive. Rather, on those courts' view, the plaintiff must proceed on a theory of direct liability and "prove that higher management knew or should have known of the sexual harassment." *Henson* v. *City of Dundee*, 682 F.2d at 905, 910. Accord, *Katz* v. *Dole*, 709 F.2d at 255-256 & n.6. The employee can demonstrate actual knowledge on the employer's part by filing an EEOC charge or "by showing that she complained to higher management" about the misconduct (*Henson*, 682 F.2d at 905).[14] Alternatively, a victim can demonstrate the employer's awareness "by showing * * * the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Ibid.* Accord, *e.g.*, *Taylor* v. *Jones*, 653 F.2d 1193, 1197-1199 (8th Cir. 1981) (holding employer liable

[13] See Restatement (Second) of Agency § 165 comment *e* (1958) ("If [a party] knows that the agent is acting for the benefit of himself or a third person, the transaction is suspicious upon its face, and the principal is not bound unless the agent is authorized.").

[14] A complainant may wish to pursue both avenues simultaneously in order to prevent the Title VII statute of limitations from running. See 42 U.S.C. 2000e-5(e); *I.U.O.E.* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976). The filing of an EEOC charge would of course trigger attempts at voluntary conciliation (see 42 U.S.C. 2000e-5(b)).

for racially hostile working environment where practice of highly offensive racial slurs "was so pervasive and so long continuing * * * that the employer must have become conscious of it").

While we agree with the Fourth and Eleventh Circuits that an employer should not be held liable for sexual harassment of the pure "hostile environment" type unless it knows or has reason to know about such misconduct,[15] neither of those courts addressed a fundamental doctrinal problem: under what circumstances should knowledge of the sexually harassing conduct be imputed to the employer? For example, if the victim's supervisor is the offending party, and if the employer has limited the victim to complaint through the supervisor, it is not unreasonable to impute to the employer the supervisor's knowledge of his own offense. More generally, an employer might well be deemed to have "reason to know" about sexual harassment if it has deliberately turned its back on the problem, that is, if there is no reasonably available avenue by which victims of sexual harassment can make their complaints known to appropriate officials who are in a position to do something about those complaints.

Sexually harassing actions of a supervisor, like those of a co-worker or indeed of a non-employee, have an obvious effect on the working environment, and that effect may be discriminatory. However, to impute the behavior automatically and strictly to the employer—as is appropriate in "quid pro quo" cases—is not only doctrinally unwarranted by normal principles of agency law but practically unfair to the employer and perhaps even productive of unnecessary and harmful side effects.

[15] We do not, however, agree with an aspect of the rationale that the *Henson* court articulated in adopting this standard. The court stated that "[t]he capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual" (682 F.2d at 910). We think that this statement is contrary both to common sense and to practical experience.

Given the naturalness, the pervasiveness, and what might be called the legal neutrality of sexual attraction (as contrasted to racial prejudice), we find much wisdom in Judge Bork's observation that a rule of strict liability would create an incentive for employers to "monitor[] or polic[e] * * * employees' voluntary sexual relationships" (Pet. App. 25a n.3). On the other hand, the very fact that sexually harassing conduct almost by definition is outside the scope of any employee's job description should not necessarily shield an employer from responsibility for what may become a condition, and a discriminatory condition, of employment.

The sensible course in determining whether an employer has "reason to know" about the existence of a sexually hostile environment at his workplace should focus on the systemic relation between the conduct of particular individuals—whether supervisors, co-workers or third parties such as customers or suppliers—and the employer. More particularly, we propose a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e.g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.[16]

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[16] Depending on the facts—in a small company, perhaps—an informal means of complaint could well be sufficient.

The rule that we propose recognizes first of all that an employer should not escape responsibility for a condition in the workplace by neglect, indifference, willful ignorance or even connivance, even though that condition may not further the employer's business. Second, such a rule obviates conceptual difficulties regarding actual or constructive notice to corporate employers which, after all, can only act through agents, agents who in some cases may be the very perpetrators of the wrong. Third, such a rule recognizes that sexual harassment only becomes a violation of Title VII, as opposed to a common law tort, insofar as it creates a hostile and therefore discriminatory work *environment*. If an employee in the victim's situation might reasonably be expected to know that effective avenues of complaint and redress are available, then the availability of such avenues *itself* becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the environment as a specifically *work* environment, leaving only the now-patently-individual and unauthorized behavior of the harasser. Fourth, the rule we propose can be made to apply to and distinguish appropriately among the behavior of supervisors, co-workers and third parties. Both the ways in which these different actors might create a hostile environment, and the ways in which the employer might properly respond, may differ. Finally, the rule we propose creates incentives for employer responses that are likely to prevent and redress harassment, while not tempting employers to engage in preventive measures—such as declining to hire women, or regulating employees' personal relationships—so extreme as themselves to be offensive.

The rule we propose is an elaboration of the approach to sexual harassment cases taken by the EEOC, whose guidelines state that the Commission will "examine the circumstances of the particular employment relationship" in determining when a supervisor acts as the employer's agent (29 C.F.R. 1604.11(c)). In accordance with the guidelines, our approach looks to the employment setting to determine whether the employer has created a reason-

ably available avenue of complaint for the victim of a supervisor's harassment, or alternatively whether the employer's policies leave the supervisor with unchecked, final control over the victim. The EEOC's guidelines concerning employer liability for sexual harassment by coworkers or non-employees also mesh with our approach, providing for liability where the employer "knows or should have known" of the misconduct. 29 C.F.R. 1604.11(d) and (e).

The EEOC's considerable experience in dealing with sexual harassment claims has led it to conclude that "[p]revention is the best tool for the elimination of sexual harassment" (29 C.F.R. 1604.11(f)). The standard that we propose for determining employer liability permits the employer to shield himself from liability by taking common-sense steps to prevent sexual harassment. Ideally, an effective preventive program should include an explicit policy against sexual harassment, articulated in a clear statement regularly communicated to employees. In implementing that policy, the employer should take all reasonable steps necessary to prevent sexual harassment from occurring, "such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise, and how to raise, the issue of harassment under Title VII, and developing methods to sensitize all concerned" (*ibid*). Grievance procedures established to resolve sexual harassment claims in practice should ensure confidentiality, allow complaints to be lodged with persons other than an employee's supervisor, and provide effective remedies, including protection of victims against retaliation, as Title VII itself provides (42 U.S.C. 2000e-3(a)). Most importantly, perhaps, grievance procedures should be "user-friendly." Sexual harassment is often as embarrassing to describe as it is distressing to experience. If a grievance procedure is to work, it must be one that victims will not be afraid to use. Of course, a formal grievance procedure is not the only avenue by which an aggrieved employee might make a claim of sexual harassment known to his or her employer, but a procedure that meets the criteria we have described should afford the employer a "safe harbor" defense absent actual knowledge of a sexually hostile environment.

If the Court were to reach the question of the bank's liability in this case, the rule of employer liability that we propose would require a remand to the district court for further factual findings. The bank here did have an "express policy of * * * nondiscrimination in employment practices" and "a grievance procedure whereby any employee [might] state a grievance and have it resolved, if not by a supervisor, then by the division head or the president" (Pet. App. 43a). The bank's general nondiscrimination policy, however, did not address sexual harassment in particular. See Plaintiff's C.A. App. 124. Moreover, the bank's grievance procedure required an employee to attempt to resolve the problem by first communicating it (orally and then in writing) to his or her supervisor (in this case, Taylor). *Id.* at 125. Only if that process failed would the employee's grievance, together with the supervisor's written reply, be forwarded to upper management (*ibid.*). On this state of the record, it cannot be determined whether the bank had made available to an employee in Vinson's position—*i.e.*, an employee who was an assistant branch manager, and who in consequence may previously have had some access to upper management—a reasonable avenue by which she could make her allegations of sexual harassment known to appropriate bank officials who were in a position to rectify the problem.

We think that the standard we have proposed provides a rule of liability that is balanced and fair, and that best serves the remedial purposes of Title VII. The gravamen of a "hostile environment" claim is that the employer has improperly *tolerated* a sexually discriminatory atmosphere. A charge of "toleration" is meaningless if the employer has no way of knowing about the evil, and thus no way of correcting it. If a victim, in order to establish employer liability, must prove that he

or she took advantage of reasonably available complaint mechanisms, there will be a strong incentive to bring legitimate claims of sexual harassment to the employer's attention. And if the employer has implemented an effective procedure for resolving such claims, it will be in the employee's interest to use it, since failure to do so will create a presumption that the claimed harassment never took place. As this Court has noted in a related context, the use of grievance procedures should be encouraged as a mode of resolving discrimination claims, for they "may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate a resort to the judicial forum." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 55 (1974). Most importantly, the mode of resolution that we propose should facilitate swift and effective redress for the victims of sexual harassment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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Supreme Court of the United States
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MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE STATES OF NEW JERSEY, CALIFORNIA, CONNECTICUT, ILLINOIS, MINNESOTA, NEW MEXICO, NEW YORK, VERMONT AND THE PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT:

A. SEXUAL HARASSMENT WHICH HAS THE EFFECT OF CREATING AN INTIMIDATING, HOSTILE OR OFFENSIVE WORKING ENVIRONMENT IS PROHIBITED BY TITLE VII, 42 *U.S.C.* § 2000e-2(a) 3

B. IN ORDER TO PROVIDE AN ADEQUATE REMEDY FOR THE VICTIMS OF SEXUAL HARASSMENT, AN EMPLOYER SHOULD BE HELD LIABLE UNDER TITLE VII WHEN A SUPERVISOR CREATES A HOSTILE WORKING ENVIRONMENT THROUGH SEXUAL HARASSMENT OF AN EMPLOYEE 16

C. BOTH PARTIES SHOULD BE PERMITTED TO INTRODUCE EVIDENCE ON THE ISSUES OF WHETHER ANY SEXUAL RELATIONSHIP BETWEEN PLAINTIFF AND THE SUPERVISOR WAS VOLUNTARY OR COERCED AND WHETHER ANY SEXUAL OVERTURES OR REMARKS WERE WELCOME OR UNWELCOME 27

CONCLUSION 28

TABLE OF AUTHORITIES

Pages

CASES CITED

Alexander v. Gardner-Denver Co., 415 *U.S.* 36, 94 *S.Ct.* 1011, 39 *L.Ed.*2d 147 (1974) 3, 22, 25, 26

Anderson v. Methodist Evangelical Hospital, Inc., 464 *F.*2d 723 (6th Cir. 1972) 16

Barnes v. Costle, 561 *F.*2d 983 (D.C. Cir. 1977) 7, 9, 10, 16, 19

Bundy v. Jackson, 641 *F.*2d 934 (D.C. Cir. 1981) 7, 8, 13, 14, 15, 19, 22

Cariddi v. Kansas City Chiefs Football Club, 568 *F.*2d 87 (8th Cir. 1977) 5

Carroll v. Talman Federal Savings and Loan Ass'n., 604 *F.*2d 1028 (7th Cir. 1979) *cert. den.* 445 *U.S.* 929 (1980) 5

Compston v. Borden, Inc., 424 *F. Supp.* 157 (S.D. Ohio 1976) 6

Continental Can Co. v. Minnesota, 297 *N.W.*2d 241 (Minn. 1980) 13

Craig v. Y&Y Snacks, 721 *F.*2d 77 (3d Cir. 1983) 17, 18

Ferguson v. E.I. duPont de Nemours, 560 *F. Supp.* 1172 (D. Del. 1983) 10

Firefighters Institute for Racial Equality v. St. Louis, 549 *F.*2d 506 (8th Cir. 1977) *cert. den.* 434 *U.S.* 819 (1977) 5

Flowers v. Crouch-Walker Corp., 552 *F.*2d 1277 (7th Cir. 1977) 16

Franks v. Bowman Transportation, Co., Inc., 424 *U.S.* 747, 96 *S.Ct.* 1251, 47 *L.Ed.*2d 444 (1976) 3

TABLE OF AUTHORITIES—Continued

Pages

Gan v. Kepro Circuit Systems, 28 *Fair Empl. Prac. Cas.* (BNA) 639 (E.D. Mo. 1982) 28

Gay v. Bd. of Trustees of San Jacinto College, 608 *F.*2d 127 (5th Cir. 1979) 16

Goss v. Exxon Office Systems Co., 747 *F.*2d 885 (3rd Cir. 1984) 14

Grano v. City of Columbus, 637 *F.*2d 1073 (6th Cir. 1980) 27

Griggs v. Duke Power Co., 401 *U.S.* 424, 91 *S.Ct.* 849, 28 *L.Ed.*2d 158 (1971) 3

Harrington v. Vandalia-Butler Bd. of Educ., 585 *F.*2d 192 (6th Cir. 1978) *cert. den.* 441 *U.S.* 932 (1979) 5

Henson v. City of Dundee, 682 *F.*2d 897 (11th Cir. 1982) 6, 7, 8, 9, 12, 15, 16, 19, 20

Hishon v. King and Spalding, — *U.S.* —, 104 *S.Ct.* 2229, 81 *L.Ed.*2d 59 (1984) 4

Horn v. Duke Homes, 755 *F.*2d 599 (7th Cir. 1985) 17, 23

Jeppsen v. Wunnicke, 611 *F. Supp.* 78 (D. Alaska 1985) 10, 12, 14, 18, 19

Katz v. Dole, 709 *F.*2d 251 (4th Cir. 1983) 8, 10, 12

Los Angeles Dep't. of Water v. Manhart, 435 *U.S.* 702, 98 *S.Ct.* 1370, 15 *L.Ed.*2d 657 (1978) 4, 7

McDonnell Douglas Corp. v. Green, 411 *U.S.* 792, 93 *S.Ct.* 1817, 36 *L.Ed.*2d 668 (1973) 3

McKinney v. Dole, 765 *F.*2d 1129 (D.C. Cir. 1985) 13

Miller v. Bank of America, 600 *F.*2d 211 (9th Cir. 1979) 16, 17, 19

TABLE OF AUTHORITIES—Continued

Pages

Morgan v. Hertz Corp., 542 *F. Supp.* 123 (W.D. Tenn. 1981) *aff'd* 725 *F.*2d 1070 (6th Cir. 1984) 22

Munford v. James T. Barnes & Co., 441 *F. Supp.* 459 (E.D. Mich. 1977) 17

Oscar Mayer & Co. v. Evans, 441 *U.S.* 750, 99 *S.Ct.* 2066, 60 *L.Ed*2d 609 (1979) 21

Reichman v. Bureau of Affirmative Action, 536 *F. Supp.* 1149 (M.D. Pa. 1982) 10

Robson v. Eva's Super Market, 538 *F. Supp.* 857 (N.D. Ohio 1982) 13, 14, 23

Rogers v. EEOC, 454 *F.*2d 234 (5th Cir. 1971) *cert. den.* 406 *U.S.* 957 (1972) 4, 10

Stewart v. Campbell Soup Company, 27 *Fair Empl. Prac. Cas.* (BNA) 972 (N.D. Ohio 1981) 27

Stewart v. Thomas, 538 *F. Supp.* 891 (D.D.C. 1982) 15

Swint v. Pullman Standard, 539 *F.*2d 77 (5th Cir. 1976) *rev'd. on other grounds*, 456 *U.S.* 237 (1982) 5

Taylor v. Jones, 653 *F.*2d 1193 (8th Cir. 1981) 4, 25

Tidwell v. American Oil Co., 332 *F. Supp.* 424 (D. Utah 1971) 16, 17

Trafficante v. Metropolitan Life Insurance Co., 409 *U.S.* 205, 93 *S.Ct.* 364, 34 *L.Ed.*2d 415 (1972) 5

United States v. City of Buffalo, 457 *F. Supp.* 612 (W.D.N.Y. 1978) *mod.* and *aff'd.* 633 *F.*2d 643 (2d Cir. 1980) 5

Vinson v. Taylor, 753 *F.*2d 141 (D.C. Cir. 1985) 19

Waters v. Heublein, Inc., 547 *F.*2d 466 (9th Cir. 1976) 5

TABLE OF AUTHORITIES—Continued

Page

Williams v. Saxbe, 413 *F. Supp.* 654 (D.D.C. 1976) 17

Young v. Southwestern Savings and Loan Ass'n, 509 *F.*2d 140 (5th Cir. 1975) 14, 16

Statutes Cited

Cal. Evid. Code § 1106 28

Cal. Gov't. Code § 11513(c) 28

N.J.S.A. 10:5-12(a) 1

42 *U.S.C.* § 2000e 16

42 *U.S.C.* § 2000e-1 *et seq.* 1

42 *U.S.C.* § 2000e-2 16

42 *U.S.C.* § 2000e-2(a) 3

42 *U.S.C.* § 2000e-2(a)(1) 2

42 *U.S.C.* § 2000e-5(g) 22

Federal Regulations Cited

29 *C.F.R.* § 1601.74 1

29 *C.F.R.* § 1604.11 ..... 6, 8, 27

29 *C.F.R.* § 1604.11(b) 9

29 *C.F.R.* § 1604.11(c) 24

Miscellaneous Sources Cited

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TABLE OF AUTHORITIES—Continued

Pages

1A. Larson & Larson, Employment Discrimination § 41.62 (1984) ——— 7

M. Rossein, *Sex Discrimination and the Sexually Charged Work Environment*, 9 *Review of Law and Social Change* 271 (1979-1980) ——— 11

INTEREST OF THE AMICI CURIAE

Recognizing the importance of eradicating sex discrimination from the workplace, the State of New Jersey has a strong interest in effective enforcement of both Federal and State civil rights laws, in order to remedy existing discrimination and prevent future acts of discrimination. The State of New Jersey, through its Division on Civil Rights, enforces the New Jersey Law Against Discrimination, which prohibits sex discrimination in employment. *N.J.S.A.* 10:5-12(a). The Law Against Discrimination (LAD) is analogous to Title VII, 42 *U.S.C.* § 2000e-1, *et seq.*, and pursuant to Title VII, the New Jersey Division on Civil Rights works closely with the Equal Employment Opportunity Commission (EEOC) to enforce the Federal and State laws prohibiting sex discrimination in employment. *See* 29 *C.F.R.* § 1601.74. The views expressed in this brief regarding the interpretation of Title VII parallel the construction by the Division on Civil Rights of New Jersey's own Law Against Discrimination. If Title VII is interpreted to prohibit sexual harassment to the same extent as the LAD and to provide for the same extent of employer liability, this interpretation will strengthen enforcement of New Jersey's LAD, and will allow the EEOC and the Division to share the enforcement burden. To the extent that Title VII is interpreted to provide less protection against sexual harassment than does the LAD, a greater burden will fall on the State to enforce its anti-discrimination law without the support of the EEOC. The *amici* California, Connecticut, Illinois, Minnesota, New Mexico, New York, Vermont and the Pennsylvania Human Relations Commission (participating with consent of the parties) have an equally strong interest in the eradication of sexual harass-

ment from the workplace and, therefore, in the effective enforcement of Title VII.

SUMMARY OF ARGUMENT

A hostile working environment created by sexual harassment violates Title VII by imposing tolerance of repeated unwelcome sexual advances or comments as a term or condition of employment. 42 *U.S.C.* § 2000e-2(a)(1). Sexual harassment in the workplace creates a significant barrier to employment opportunities and must be eradicated in order to effectuate the goals of Title VII. Pursuant to well-established Title VII principles, an employer should be liable for sexual harassment of an employee by a supervisor, whether or not the supervisor made an explicit threat to the employee's job status in connection with the harassment. Whenever a supervisor has power to affect an employee's job status repeated unwelcome sexual advances by the supervisor carry with them an implicit threat of reprisal. Moreover, employer liability is crucial to effective enforcement of Title VII because in many cases an adequate remedy for a hostile work environment will require injunctive relief against the employer which ultimately controls the workplace and its supervisor.

Where an employee alleges that a supervisor either created a hostile work environment or actually forced her to have sexual relations, both parties should be permitted to introduce relevant evidence as to the welcome or unwelcome nature of the supervisor's behavior and as to whether the sexual relationship was voluntarily or coerced.

ARGUMENT

POINT I

SEXUAL HARASSMENT WHICH HAS THE EFFECT OF CREATING AN INTIMIDATING, HOSTILE OR OFFENSIVE WORKING ENVIRONMENT IS PROHIBITED BY TITLE VII, 42 U.S.C. § 2000e-2(a).

An allegation of a sexually hostile or offensive work environment should be actionable under Title VII, 42 *U.S.C.* § 2000e-2(a). Reference to the statutory language alone is sufficient to determine that Congress clearly intended to eliminate discrimination in the workplace which is psychological and/or environmental in nature. Section 703(a) of Title VII states in unequivocal terms, that:

> [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions,* or *privileges* of employment because of such individual's race, color, religion, *sex* or national origin; . . . . [42 *U.S.C.* § 2000e-2(a); emphasis supplied].

This Court has interpreted Congress' mandate in Title VII of the Civil Rights Act of 1964 as prohibiting "*all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . " *Franks v. Bowman Transportation Co., Inc.*, 424 *U.S.* 747, 763, 96 *S.Ct.* 1251, 1263, 47 *L.Ed.*2d 444, 461 (1976) (emphasis supplied) *citing, Alexander v. Gardner-Denver Co.*, 415 *U.S.* 36, 44, 94 *S.Ct.* 1011, 1017, 39 *L.Ed.*2d 147, 155 (1974); *McDonnell Douglas Corp. v. Green*, 411 *U.S.* 792, 800, 93 *S.Ct.* 1817, 1823, 36 *L.Ed.*2d 668, 676 (1973); *Griggs v. Duke Power Co.*, 401 *U.S.* 424, 429-430, 91 *S.Ct.* 849, 852-853, 28 *L.E.*2d 158, 163-164 (1971). Additionally, this Court has stated that "in forbidding employers to discriminate against in-

dividuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Los Angeles Dep't of Water v. Manhart*, 435 *U.S.* 702, 707, n.13, 98 *S.Ct.* 1370, 1375, n.13, 55 *L.Ed.*2d 657, 665, n.13 (1978) (emphasis supplied). *See also, Hishon v. King and Spalding*, — U.S. —, —, 104 *S.Ct.* 2229, 2234, 81 *L.Ed.*2d 59, 67 (1984) (benefits comprising incidents of employment may not be afforded in a manner contrary to Title VII).

Consistent with this mandate the prohibition against discriminatory "terms and conditions" of employment has been repeatedly interpreted by the federal courts as prohibiting the maintenance of a racially or ethnically discriminatory work environment. In *Rogers v. EEOC*, 454 *F.*2d 234, 238 (5th Cir. 1971), *cert. den.* 406 *U.S.* 957 (1972), Judge Goldberg of the Fifth Circuit Court of Appeals articulated an interpretation of Title VII which has been consistently followed in other cases as an accurate analysis of the legislative intent behind Title VII. Referring to the language in Section 703(a)(1) of Title VII concerning the "terms, conditions, or privileges of employment," Judge Goldberg stated:

> One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices. [*Rogers v. EEOC, supra*, 454 *F.*2d at 238].

Since the Fifth Circuit's decision in *Rogers*, Title VII's mandate to eliminate discrimination has been invoked to address a variety of claims alleging discriminatory work environment.*

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* *Taylor v. Jones*, 653 *F.*2d 1193, 1199 (8th Cir. 1981) (racially discriminatory work environment clearly violates Title VII); *Car-*

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In a subsequent Fifth Circuit case the Court was required to directly decide whether a Title VII plaintiff must show economic loss to prove discrimination. *Swint v. Pullman Standard*, 539 *F.*2d 77, 89 (5th Cir. 1976) *rev'd on other grounds*, 456 *U.S.* 237 (1982). The plaintiffs had alleged that their employer had been assigning jobs in a discriminatory manner. The Court stated, "Title VII contains neither requirement nor implication that economic harm must be shown before a class can be found to have made out a prima facie case of racially discriminatory job assignment. Indeed, the statutory prohibitions of the enactment are explicitly broader than economic harm." *Id.* at 89-90; *see also United States v. City of Buffalo, supra*, 457

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roll v. Talman Federal Savings and Loan Ass'n., 604 *F.*2d 1028, 1032, n.13 (7th Cir. 1979), *cert. den.*, 445 *U.S.* 929 (1980) (dress policy which required female employees to wear uniform without imposing the same requirement on men in the same positions held violative of Section 703(a)(1), court expressly rejected defendant's contention that Title VII was limited to benefits of employment); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 *F.*2d 192, 194, n.3 (6th Cir. 1978), *cert. den.* 441 *U.S.* 932 (1979) (inferior working conditions afforded female physical education teachers violates prohibition against unequal "privileges of employment"); *Cariddi v. Kansas City Chiefs Football Club*, 568 *F.*2d 87, 88 (8th Cir. 1977) (holding that ethnically derogatory comments could be so excessive and opprobrious as to constitute an unlawful employment practice under Title VII); *Firefighters Institute for Racial Equality v. St. Louis*, 549 *F.*2d 506, 514 (8th Cir. 1977) *cert. den.*, 434 *U.S.* 819 (1977) (the exclusion of blacks from informal "supper clubs", although not organized or regulated by the employer, prohibited by Title VII); *Waters v. Heublein, Inc.*, 547 *F.*2d 466, 469 (9th Cir. 1976) (holding that white woman had standing to sue to redress racial and ethnic discrimination); *United States v. City of Buffalo*, 457 *F. Supp.* 612, 631 (W.D.N.Y. 1978) *mod.* and *aff'd*, 633 *F.*2d 643 (2d Cir. 1980). *Cf. Trafficante v. Metropolitan Life Insurance Co.*, 409 *U.S.* 205, 209-10, 93 *S.Ct.* 364, 367, 34 *L.Ed.*2d 415 (1972) (white and black tenants have standing to allege "the loss of important benefits from interracial associations").

F. Supp. at 631 (psychological impact of a discriminatory work environment falls within expansive statutory language); *Compston v. Borden, Inc.*, 424 *F. Supp.* 157, 160-161 (S.D. Ohio 1976) (conduct calculated to demean employee because of religion altered conditions of employment in violation of Title VII).

To rule as a matter of law that sexual harassment which has the effect of creating an "intimidating, hostile, or offensive working environment"* is not actionable under Title VII, would be clearly contrary to this Court's and to the Circuit Courts' previous interpretations of Congress' legislative intent. "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. Rep. No. 238, 92d Cong., 1st Sess.5 (1971), *reprinted in* 1972 U.S. Cong. and Ad. News 2137, 2141. As the Eleventh Circuit Court of Appeals stated in *Henson v. City of Dundee*, 682 *F.*2d 897, 902 (11th Cir. 1982),

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. [*Ibid.*]

This Court has also instructed "Section 703(a)(1) [of Title VII] subjects to scrutiny and eliminates such irra-

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* This characterization of a discriminatory work environment is taken directly from the Equal Employment Opportunity Commission's (EEOC) *Guidelines on Discrimination Because of Sex*, 29 *C.F.R.* § 1604.11 issued in 1981.

tional impediments to job opportunities and enjoyment which have plagued women in the past." *Los Angeles Dep't of Water v. Manhart, supra*, 435 *U.S.* at 707, n.13, 98 *S.Ct.* at 1375, n.13, 55 *L.Ed.* 2d at 665, n.13.

Consistent with this analysis the Courts of Appeals which have addressed the related issue of what is referred to as *quid pro quo* harassment have uniformly found that "[a]n employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits." *Henson v. City of Dundee, supra*, 682 *F.*2d at 908. *See, e.g., Bundy v. Jackson*, 641 *F.*2d 934 (D.C. Cir. 1981); *Barnes v. Costle*, 561 *F.*2d 983 (D.C. Cir. 1977); *see also* 1A. Larson & Larson, *Employment Discrimination* § 41.62 (1984) (concluding that "the universal rule now is that sexual harassment on the job can be employment discrimination within the meaning of Title VII"). Typically *quid pro quo* harassment will take the form which it did in *Barnes v. Costle*, in which the plaintiff's supervisor, among other remarks, repeatedly suggested to her "that if she cooperated with him in a sexual affair, her employment status would be enhanced." *Barnes v. Costle, supra*, 561 *F.*2d at 985. In *Barnes* the plaintiff alleged that her position was subsequently abolished as a result of her refusal to engage in an "after hour affair."

By comparison to *quid pro quo* type cases, cases alleging sexually discriminatory work environment alone are somewhat more subtle. However, by relying on the wealth of legal precedent developed in cases holding that racially or ethnically discriminatory work environments violated Title VII, Courts of Appeals have held that Title VII also prohibits the existence of a sexually hostile or offensive work environment. *Bundy v. Jackson, supra*, 641

*F.*2d at 945 ("the relevance of these 'discriminatory environment' cases is beyond serious dispute"); *see, e.g., Katz v. Dole*, 709 *F.*2d 251 (4th Cir. 1983); *Henson v. City of Dundee, supra.*

In *Bundy v. Jackson*, the District of Columbia Circuit Court of Appeals reversed the District Court's denial of injunctive and declaratory relief and stated:

> What remains is the novel question whether the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the '*terms, conditions, or privileges of employment*'. Though no court has as yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination. [*Id.* at 943-944; emphasis in original].

The plaintiff in *Bundy* was continually subjected to harassment by two of her supervisors. When Bundy complained of this harassment to a superior supervisor, her complaints were casually dismissed and she was told that "any man in his right mind would want to rape you." The supervisor making this remark then proceeded, himself, to request that Bundy begin a sexual relationship with him. *Id.* at 940. As the Court in *Bundy* held, this demeaning and degrading treatment in the workplace violates Title VII.

The EEOC's Guidelines on Sexual Harassment, 29 *C.F.R.* § 1604.11, *supra*, provide well reasoned guidance for courts deciding issues presented in sexual harassment cases. The standards set forth in the Guidelines establish an effective means of providing redress to individuals sub-

jected to sexually discriminatory work environments, while also addressing concerns which have been articulated regarding the "unique" character of sexually discriminatory work environments as opposed to racially or ethnically discriminatory work environments.*

An essential element required by the Guidelines in proving sexual harassment is that the conduct complained of be "unwelcome." As the court in *Henson* noted, the determination of "[w]hether the advances are unwelcome . . . becomes an evidentiary question well within the courts' ability to resolve." *Henson v. City of Dundee, supra,* 682 *F.*2d at 903 *quoting* Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII,* 61 *B.U.L. Rev.* 535, 561 (1981).

The Guidelines also instruct that a determination of whether the alleged conduct constitutes sexual harassment should be made by looking at "the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 *C.F.R.* § 1604.11(b). Courts have, in effect, utilized this approach and have concluded that the harassment alleged and proven must be more than an isolated incident or a "mere utterance" of a derogatory epithet. *See, e.g., Rog-*

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* *See Barnes v. Costle*, 561 *F.*2d 983, 1001 (D.C. Cir. 1977) (MacKinnon concurring). Judge MacKinnon argues that sexual advances may not be intrinsically offensive and are to some extent normal and expectable, as opposed to, for example, racial epithets. Although there may be an element of truth in Judge MacKinnon's observation, one need only review the facts presented in most sexual harassment cases to realize that the line between socially acceptable behavior and offensive and/or hostile behavior is not nearly so blurred as some would claim it is. Furthermore this Court should not out of concern for "bright lines" implicitly condone behavior which is clearly offensive, derogatory, hostile and totally unacceptable for the workplace.

ers v. EEOC, supra, 454 *F.*2d at 238; *Ferguson v. E. I. duPont de Nemours,* 560 *F.Supp.* 1172, 1197-1198 (D. Del. 1983); *Reichman v. Bureau of Affirmative Action,* 536 *F. Supp.* 1149, 1177 (M.D. Pa. 1982). Moreover, as in any factual issue before a court, the employer has the opportunity to rebut the employee's claim of sexual harassment by showing that the alleged events did not take place, or by showing that they were isolated or genuinely trivial. *See, Katz v. Dole, supra,* 709 *F.*2d at 256.

Although the factual determinations to be made by courts in sexually discriminatory work environment cases are in many instances not simple ones (*see Jeppsen v. Wunnicke,* 611 *F. Supp.* 78, 82 (D. Alaska 1985)) this does not justify denying potential plaintiffs a cause of action under Title VII for such claims. In *Barnes v. Costle* the employer argued that if sexual harassment claims were found to be justiciable the courts would find themselves embroiled in controversies arising from "inharmonious" personal relationships. The court responded by stating:

> This consideration is wholly beside the point in this forum. We cannot assume that Congress did not realize that any problem in this connection inheres also in claims of employment discrimination stemming from race, color, religion or national origin, and that any such difficulty is treatable by measures other than disregard of the legislative will. [citation omitted] [*Barnes v. Costle, supra,* 561 *F.*2d at 994, n.81].

Moreover, the problem of sexual harassment in the workplace has proven to be much more serious than simply controversies arising from "inharmonious" personal relationships. An analysis of the statistics relevant to this problem have established that, as in one author's words, "[s]exual harassment of women in the workplace is a

particularly insidious aspect of sex discrimination which has severe economic and psychological repercussions." M. Rossein, *Sex Discrimination and the Sexually Charged Work Environment,* 9 *Review of Law and Social Change* 271 (1979-1980) (hereinafter *Work Environment*). It is safe to estimate that anywhere between 42 and 88% of the female work force has at some point been subjected to sexual harassment. *Id.* at 276-277. The economic impact which sexual harassment has on women confirms the conclusion that this form of sex discrimination operates as a true barrier to equal employment for women. As the author of *Work Environment* concluded:

> [S]exual harassment contributes to women's lower rate of continuous employment, with such attendant consequences as failure to obtain promotions or to receive on-the-job training, loss of non-transferable fringe benefits, and failure to accumulate seniority rights. In addition, it contributes to the higher rate of female unemployment. [*Work Environment, supra,* at 277].

Additionally, the psychological effect of sexual harassment, and its impact on a woman's job performance, also create a barrier to achieving equal employment of women. *See* P. Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women* (Working Women's Institute Research Series Report No. 3 1979).

In light of the preliminary research which indicates that the majority of women who are subjected to sexual harassment experience serious psychological and physical symptoms as well as diminished work performance, the legal distinction between *quid pro quo* harassment and work environment claims developed in such cases as *Hen-*

son v. City of Dundee, supra, becomes somewhat amorphous. When a woman's performance decreases substantially because of the stress effects of constant sexual harassment, and as a result of her poor work performance she is denied the opportunity for advancement, a non-discriminatory work environment cannot be considered an "intangible job benefit."* Courts have acknowledged the amorphous nature of the distinction which has developed. *See, e.g., Henson v. City of Dundee, supra,* 682 *F.*2d at 908, n.18; *Jeppsen v. Wunnicke, supra,* 611 *F. Supp.* at 83. The court in *Jeppsen* observed:

> The distinction above alluded to between "tangible job benefit" (*quid pro quo*) cases and "hostile work environment" cases is often discussed by courts, but this court finds it an extremely slippery concept. [citation omitted]. The situations which are dealt with in sex discrimination cases, as well as other discrimination cases, present a factual and legal continuum. There is no neat square peg that fits into a square hole nor a round peg for a round hole. Rather, there is a seemingly endless variety of sex discrimination cases with one situation blending into another when comparisons are made. [*Ibid.*]

See also, Katz v. Dole, supra, 709 *F.*2d at 225 (although primary claim fell within the "condition of work" category, plaintiff was also made *quid pro quo* propositions);

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* Of the women surveyed by the Working Women's Institute, 80% conceded that the harassment had in some way interfered with their job performance. However, only 16% of the women surveyed stated that they were explicitly threatened with repercussions if they did not cooperate. P. Crull, *The Impact of Sexual Harassment on the Job, supra,* at 2, 4. The conclusion that can therefore be drawn is that a small percent of the sexual harassment occurring in the workplace is actually *quid pro quo* harassment; yet the detrimental effect on women of "non-*quid pro quo*" harassment is quite tangible.

Bundy v. Jackson, supra, 641 *F.*2d at 940 (although considered a work environment claim, evidence indicated that supervisors disparaged plaintiff for alleged poor work performance and other matters after she rejected their advances); *Robson v. Eva's Super Market,* 538 *F. Supp.* 857, 861 (N.D. Ohio 1982) (although supervisor made no *quid pro quo* demands, facts would support a finding that plaintiff's rejection of his advances were used as a basis for employment decisions affecting her).

Moreover, sexual harassment often includes physical abuse of women in the workplace. *See, e.g., McKinney v. Dole,* 765 *F.*2d 1129, 1132 (D.C. Cir. 1985) (male supervisor grabbed and twisted female plaintiff's arm, causing substantial physical injury); *Robson v. Eva's Super Market, supra,* 538 *F. Supp.* at 859-60 (supervisor grabbed 19 year old plaintiff's arm roughly, causing bruising, and referring to plaintiff in a sexually profane manner told her "I want you to be afraid of me"); *Continental Can Co. v. Minnesota,* 297 *N.W.* 2d 241, 244, (Minn. 1980) (sexually discriminatory work environment found where, among other things, a co-worker physically grabbed plaintiff between her legs while she was bending over performing her job). *See also* P. Crull, *The Impact of Sexual Harassment on the Job, supra,* at 2. In light of the severity of the harassment which many women have experienced, to hold that *quid pro quo* harassment is actionable, but that "conditions of employment" harassment is not actionable would create a gross injustice.

As the Court of Appeals in *Bundy v. Jackson* correctly pointed out, if Title VII is interpreted so as not to pro-

vide legal redress to persons who experience a sexually offensive and hostile work environment, in the instances where no explicit *quid pro quo* demands are made upon them, plaintiffs will be placed in a "cruel trilemma." That is, they will be forced to choose between enduring the harassment, attempting to oppose the harassment and thereby incurring reprisals, or leaving their jobs. *Bundy v. Jackson, supra,* 641 *F.*2d at 946.

The irony of holding "conditions of employment" harassment unactionable becomes even more apparent in light of clear judicial acceptance of constructive discharge claims in Title VII actions. *See, e.g., Goss v. Exxon Office Systems Co.,* 747 *F.*2d 885 (3d Cir. 1984); *Young v. Southwestern Savings and Loan Ass'n,* 509 *F.*2d 140, 144 (5th Cir. 1975); *Robson v. Eva's Super Market, supra,* 538 *F. Supp.* at 857. It would create a grave injustice to hold that a woman who remains on the job and endures sexual harassment is foreclosed from making a claim under Title VII for a discriminatory work environment, while a woman who leaves the job may be able to claim constructive discharge based on a sexually discriminatory work environment and therefore be entitled to back pay damages if she prevails. If a woman's economic and social status is such that she and her family are dependent on her job for survival, it may be necessary for her to remain on the job and endure the harassment with no effective legal recourse. As the court in *Jeppsen v. Wunnicke* observed, "[t]he practical problem is that the employee who stays on the job the longest and puts up with the most offensive sexual harassment is more likely than not going to be the employee who is the most dependent on retaining the job." *Jeppsen v. Wunnicke, supra,* 611 *F. Supp.* at

82. *See also,* P. Crull, *The Impact of Sexual Harassment on the Job, supra,* at 2.

In the interest of effectuating Title VII's legislative mandate of eradicating all forms of sex discrimination from the workplace, this Court should adopt the holding that a claim of a sexually discriminatory work environment is actionable under Title VII. Concerns that such a holding will open up the "floodgates of litigation" in the area of sexual harassment are ill-advised. A majority of the federal courts have held that Title VII plaintiffs cannot receive damages for mental suffering or emotional distress. *See, e.g., Henson v. City of Dundee, supra,* 682 *F.*2d at 905; *Bundy v. Jackson, supra,* 641 *F.*2d at 946, n.12. Since most work environment claims do not include claims for back pay or denied promotions, the major incentive to a plaintiff filing such a suit is to be awarded injunctive relief, and thereby be relieved of continuing harassment. Title VII's mandate will be best effectuated if plaintiffs, whose only reward is injunctive relief, are not impeded in their efforts to eliminate discrimination from their workplace.*

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* Moreover, this Court should not be dissuaded from affirming the Court of Appeals decision under the rationale that persons subjected to sexual harassment on the job can avail themselves of tort remedies rather than seeking relief under Title VII. Tort actions do not allow for the broad injunctive remedies which are often the principal remedy available in sexual harassment work environment actions. Such injunctive remedies have the effect of improving the work environment for all employees affected by the harasser(s). *See Stewart v. Thomas,* 538 *F. Supp.* 891, 897 (D.C. 1932).

POINT II

IN ORDER TO PROVIDE AN ADEQUATE REMEDY FOR THE VICTIMS OF SEXUAL HARASSMENT, AN EMPLOYER SHOULD BE HELD LIABLE UNDER TITLE VII WHEN A SUPERVISOR CREATES A HOSTILE WORKING ENVIRONMENT THROUGH SEXUAL HARASSMENT OF AN EMPLOYEE

Under Title VII, 42 *U.S.C.* § 2000e-2, an employer is prohibited from discriminating "against any individual with respect to . . . terms, conditions or privileges of employment because of . . . sex." The statute defines "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person." 42 *U.S.C.* § 2000e. Since a supervisor is an "agent" of the employer, the general rule under Title VII is that where a supervisor, using the authority given him by the employer, commits discrimination in violation of Title VII, the employer is liable for that discrimination. *See, e.g., Young v. Southwestern Savings and Loan Ass'n*, 509 *F.*2d 140 (5th Cir. 1975); *Flowers v. Crouch-Walker Corp.*, 552 *F.*2d 1277 (7th Cir. 1977); *Gay v. Bd. of Trustees of San Jacinto College*, 608 *F.*2d 127 (5th Cir. 1979); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 *F.*2d 723 (6th Cir. 1972); *Tidwell v. American Oil Co.*, 332 *F. Supp.* 424 (D. Utah 1971). This rule has been applied in numerous sexual harassment cases in which the supervisor had the power to hire, fire or affect a subordinate's employment status (*e.g.*, by making recommendations as to promotion or termination), and used that power to extract sexual favors from a subordinate or to retaliate against a subordinate who refused his advances. *Henson v. City of Dundee*, 682 *F.*2d 897 (11th Cir. 1982); *Barnes v. Costle*, 561 *F.*2d 983 (D.C. Cir. 1977); *Miller v. Bank of America*,

600 *F.*2d 211 (9th Cir. 1979); *Craig v. Y & Y Snacks*, 721 *F.*2d 77 (3d Cir. 1983); *Horn v. Duke Homes*, 755 *F.*2d 599 (7th Cir. 1985); *Munford v. James T. Barnes & Co.*, 441 *F. Supp.* 459 (E.D. Mich. 1977); *Williams v. Saxbe*, 413 *F. Supp.* 654 (D.D.C. 1976).

Courts applying the rule of vicarious employer liability have recognized that it would undermine the enforcement of Title VII if employers could use the corporate form as a shield against liability by claiming that even though one agent of the corporation committed discrimination the company should escape liability because the "company" did not know about it. As the Court observed in *Tidwell v. American Oil Co., supra*, 332 *F. Supp.* at 436:

> when [defendant] gave its regional accounting manager authority to fire employees, it also accepted responsibility to remedy any harm caused by his unlawful exercise of that authority. The modern, corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action.

See also, Miller v. Bank of America, supra, 600 *F.*2d at 213, in which the Court recognized that lack of a vicarious liability rule "would create an enormous loophole in the statute." This rule was also well articulated by the Court in *Horn v. Duke Homes, supra*, 755 *F.*2d at 605:

> by delegating power to [the supervisor] the "employer" and [the supervisor] essentially merged; as long as the tort complained of was caused by the exercise of this supervisory power, [the supervisor] should be deemed as acting within the scope of his employment, and the employer should be held liable for the tort. . . . Whatever the result under the common law of agency,

> Title VII demands that employers be held strictly liable for the discriminatory employment decisions of their supervisory personnel who are delegated the power to make such employment decisions. . . . It was Congress' judgment that employers, not the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination. The strict liability rule is admirably suited to this purpose.

See also, id. at 604 n.7; *Craig v. Y & Y Snacks, supra,* 721 *F.*2d at 81. In addition to "insuring compensation for victims" the *Horn* Court also recognized that a rule of strict liability would create "an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors." 755 *F.*2d at 605.

The justifications discussed above for the vicarious liability rule are as applicable in hostile work environment cases as in so called *"quid pro quo"* cases. First, as discussed in *Point I, supra,* there is often no clear distinction between a hostile environment situation and a *quid pro quo* situation. *Jeppsen v. Wunnicke,* 611 *F. Supp.* 78, 83 (D. Alaska 1985). An employee's right to redress for repeated unwelcome sexual advances by supervisors should not turn on whether the supervisor made an explicit offer or threat to affect her job status. So long as a supervisor has the power to hire, fire, promote or recommend changes in an employee's job status, he has the power to retaliate against an uncooperative subordinate, and there is therefore an implicit *"quid pro quo"* threat in any unwelcome sexual advances or abusive sexual behavior directed by a supervisor toward a subordinate. As the Court of Appeals correctly recognized, "the ability to direct employees in their work, to evaluate their performances and to recommend personnel actions carries attendant power to coerce,

intimidate and harass." *Vinson v. Taylor,* 753 *F.*2d 141, 150 (D.C. Cir. 1985). As discussed in *Bundy v. Jackson, supra,* 641 *F.*2d at 946, an employee who actively opposes a supervisor's unwelcome sexual comments or overtures can realistically expect that the supervisor will retaliate. Moreover,

> the practical problem is that the employee who stays on the job the longest and puts up with the most offensive sexual harassment is more likely than not going to be the employee who is the most dependent on retaining the job. Worse yet, this same employee is likely to be the one most reticent to complain, and thereby pass knowledge to a higher supervisor, lest he or she be confronted by the same kind of response that Bundy received when she sought to complain—that is, her complaint was not taken seriously, poor performance ratings started appearing, and ultimately a promotion was denied. [*Jeppsen v. Wunnicke, supra,* 611 *F. Supp.* at 82]

That this fear is not unfounded is illustrated by the many cases in which employees have in fact been fired or suffered other retaliation for opposing sexual harassment by a supervisor. *See, e.g., Bundy v. Jackson, supra; Barnes v. Costle, supra; Miller v. Bank of America, supra.*

Respondent Meritor Savings Bank and its supporting *amici* rely heavily on *Henson v. City of Dundee* to support the proposition that an employer should not be liable for a supervisor's creation of a hostile work environment unless the employer had actual or constructive knowledge of the supervisor's behavior. *Henson,* however, provides poor support for this proposition, because its central premise is wrong. The *Henson* Court reasoned that strict employer liability should not apply to hostile environment cases because "the capacity of a person to create a hostile or offen-

sive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual." *Id.* at 910. As *amicus curiae* Equal Employment Opportunity Commission recognizes, "this statement is contrary both to common sense and to practical experience" (Brief at 25 n. 15). The *Henson* Court also reasoned that in a *quid pro quo* situation the supervisor uses his authority to extract sexual favors from a subordinate, but in a hostile environment case he does not use his actual or apparent authority to accomplish his purpose. This premise is equally untrue. As the dissent in *Henson* recognized, "an employer delegates certain responsibilities to its supervisors, one of which certainly is to create a pleasant working environment." *Id.* at 913. Moreover, it is clearly the supervisor's power over employees which enables him to successfully require the employees to tolerate his abusive sexual behavior. In fact, some supervisors undoubtedly view the right to make sexual advances or comments to female subordinates as being one of the perquisites of the supervisory power that they have been given over these women. It is inherent in the relationship between supervisors and subordinates that subordinates will tolerate criticisms, quirks, and unpleasant behavior from their supervisors that they would not tolerate from fellow employees. When an employer clothes a supervisor with authority over others, the employer empowers the supervisor to impose his managerial style on subordinates. The supervisor's ability to impose his personality upon, and cause trouble for, disliked subordinates is a fact of life in every workplace. When an employer gives this authority to a supervisor, the employer should bear the risk that the supervisor will use that power, or apparent power, in a manner that violates Title VII.

Requiring that an employee complain first to "the employer" before she may have a cause of action under Title VII for a hostile working environment imposes an unrealistic burden on the victimized employee. As discussed above, fear of reprisal will often prevent internal complaints to the company. Employees may feel that the company will back the supervisor, who will usually have a closer relationship with upper management than does the subordinate employee; the employee may not know that an in-house complaint procedure exists; and the supervisor may implicitly or explicitly threaten the employee with retaliation if she complains about him. Moreover, an employee may see a complaint to the EEOC as preferable to an internal company complaint because after a complaint is made to EEOC the employer will know that someone outside the company is watching and may be less likely to retaliate. Indeed, the *amicus* EEOC apparently supports the view that filing a complaint with the EEOC is one acceptable way of giving an employer notice of the alleged hostile work environment (Brief at 26). Moreover, a complaint to EEOC will provide an additional incentive to the employer to remedy the violation without delay.*

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* Requiring a prior complaint to the company also sets up an exhaustion rule which is contrary to normal Title VII principles that employees need not meet procedural requirements not set forth explicitly in Title VII in order to maintain a cause of action under that statute. *Oscar Mayer & Co. v. Evans*, 441 *U.S.* 750, 99 *S.Ct.* 2066, 60 *L.Ed.* 2d 609 (1979). To the extent that employers may argue that it is unfair to impose liability without notice because notice would allow the employer to remedy the harassment, this argument could be made in any discrimination case. An employee denied promotion because of race or denied a

(Continued on following page)

From a law enforcement perspective, it is also essential to apply a rule of vicarious liability because it is often necessary to reach the employer in order to effectively remedy a hostile work environment. As the *Vinson* court recognized:

> it is the employer alone who is able promptly and effectively to halt discriminatory practices by supervisory personnel, and only the employer can provide reinstatement, back pay or other remedial relief contemplated by the act. Much of the promise of Title VII will become empty if victims of unlawful discrimination cannot secure redress from the only source capable of providing it. [753 *F.*2d at 151].

In a hostile work environment case, the appropriate remedy will normally involve injunctive relief. If courts cannot hold an employer liable for such harassment, they will not be able to order the employer to create internal procedures designed to prevent and remedy sexual harassment in the work place. *See Bundy v. Jackson, supra*, 641 *F.*2d at 947-948. Nor will a court be able to enjoin future harassment by the supervisor, to be enforced by the employer. *See Morgan v. Hertz Corp.*, 542 *F. Supp.* 123 (W.D. Tenn. 1981) *aff'd* 725 *F.*2d 1070 (6th Cir. 1984). Nor could the court order that either the offending supervisor or the victim of the discrimination be transferred to a different assignment or order that disciplinary action be taken against the harassing supervisor. *See* 42 *U.S.C.* § 2000e-5(g). The

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raise because of sex, might perhaps find redress if he or she complained to upper management. Title VII, however, was enacted to protect employees not employers and does not require prior resort to remedies which may be available through the employer. *Cf. Alexander v. Gardner-Denver Company*, 415 *U.S.* 36, 94 *S.Ct.* 1011, 39 *L.Ed.*2d 147 (1974).

employer is in the best position to prevent future harassment because the employer has ultimate control over its supervisors. To remedy a hostile work environment a court must have the power to force the employer to use its control over the supervisor to prevent a repetition of the harassment and to remedy the effects of past harassment. *See Horn v. Duke Homes, supra*, 755 *F.*2d at 605.

Vicarious liability of the employer is also crucial where an employee has been forced out of the workplace due to harassment. Where an employee has been subjected to a constructive discharge, only the employer can be forced to reinstate her. If prior knowledge by the employer is reqiured, the employer might argue that since it did not know of the supervisor's harassment while it was occurring, the employer is not liable for the harassing environment and therefore is not liable for the consequent constructive discharge of the employee. As the Court observed in *Horn v. Duke Homes*, the employer, not the innocent victim, should be liable for the consequences of its supervisor's action.* 755 *F.*2d at 605. Moreover, even if a supervisor could be held liable for back pay the employer will usually be in a better economic position to pay the award. *See Robson v. Eva's Super Market, Inc.*, 538 *F.*

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* In a constructive discharge case, however, the existence of an internal company complaint procedure might be relevant to the issue of whether a reasonable person in complainant's position would have quit her job before using the internal complaint mechanism. The existence of such a complaint procedure should not, however, be an absolute defense for the employer. The employee may not have known about the procedure, the process may have been reputed to be ineffective among employees of the company, the process might require a preliminary complaint to the harassing supervisor, or the harassment may have been too traumatic and embarrassing for the employee to feel comfortable reporting it to company personnel.

Supp. 857 (N.D. Ohio 1982) (discussing liability of the harassing supervisor).

In summary, absent a rule imposing strict liability on the employer for a hostile work environment created by a supervisor, a court may be unable to order a make-whole remedy for the injured discrimination victim. Where an employee is subjected to a hostile, intimidating or offensive work environment or is actually forced out of the workplace due to a supervisor's unwelcome sexual advances, a court should be able to reach the employer in order to frame a complete remedy for the victim.

In its brief the EEOC has proposed a rule which would in essence impose strict liability on an employer, unless the employer "has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims" and the victim has not taken advantage of that procedure (Brief at 26). While the EEOC's proposal is geared toward producing a good result, *i.e.*, motivating employers to implement complaint procedures, the proposal is impractical and represents a retreat from the EEOC's own guidelines on sexual harassment. 29 *C.F.R.* § 1604.11(c). If this Court were to adopt the EEOC's proposed rule, the trial of a hostile work environment case would inevitably focus on the effectiveness of the company's internal complaint procedure rather than on the harassment suffered by the plaintiff. The rule could result in a series of mini-trials on whether the company's internal complaint procedure was sufficiently "user-friendly" (Brief at 28), whether it provided effective remedies for harassment, and whether the procedure was sufficiently well known within the company that complainant should have known

of it. Like the schemes which this Court rejected in *Alexander v. Gardner-Denver Co., supra,* 415 *U.S.* at 58-59, for giving preclusive effect to an arbitrator's determination, the EEOC proposal is a cumbersome exception to the rule that Title VII provides a separate remedy apart from contractual or other remedies which may be provided by the employer.

Moreover, what is at stake in a "pure" Title VII hostile work environment case is not money damages but injunctive relief. *See Taylor v. Jones,* 653 *F.*2d 1193, 1203 (8th Cir. 1981). Complainant cannot recover back pay if she has suffered no tangible job loss. Hence, there is no monetary loss to the employer if the complainant files with the EEOC instead of complaining first to the company. In fact, an EEOC complaint will trigger voluntary conciliation procedures which give the employer an opportunity to remedy the hostile work environment without litigation. Only if the employer refuses to remedy the hostile work environment would the case proceed to a trial. Consequently, rather than absorbing judicial resources disputing whether complainant should have used the employer's complaint process before complaining to EEOC, the trial should concentrate on whether or not complainant suffered discriminatory sexual harassment and if so what injunctive remedy is appropriate.

A rule of strict liability will motivate employers to set up complaint procedures in order to ward off complaints to EEOC. Indeed many employers already have extensive in-house procedures designed to remedy discrimination complaints of all sorts, even though these internal complaint mechanisms will not defeat a dissatisfied employee's right to complain to the EEOC. Just as

employers find it in their interest to provide arbitration of employee grievances, even though arbitration will not defeat a subsequent Title VII complaint, so too employers will find it in their interest to create in-house complaint procedures in order to avoid Title VII complaints. *See Alexander v. Gardner-Denver Co., supra.* To the extent that the in-house procedure is effective, it will remedy instances of hostile work environment and make it unnecessary for employees to file Title VII complaints. There is no reason, however, to create a special exhaustion requirement for hostile work environment cases.*

In summary, it is the fundamental goal of Title VII to eradicate discrimination in the workplace, including unnecessary barriers to employment such as sexual harassment. Strict employer liability for a hostile work environment created by a supervisor is crucial to effective law enforcement, because the employer ultimately controls the workplace and its supervisors. Employer liability for the discriminatory acts of the supervisor is appropriate because the employer, by giving the supervisor power or influence over a subordinate's job status, gives the supervisor the power to intimidate and coerce subordinate employees into enduring a hostile work environment created by the supervisor.

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* The rule requiring actual or constructive knowledge by the employer may be reasonable, however, where fellow employees are creating the hostile environment, because the employer has not given fellow employees authority over the victim and thus has not enabled them to create implicit or explicit threats to the victim's job status which would in turn make the employee afraid to complain about the harassment.

POINT III

BOTH PARTIES SHOULD BE PERMITTED TO INTRODUCE EVIDENCE ON THE ISSUES OF WHETHER ANY SEXUAL RELATIONSHIP BETWEEN PLAINTIFF AND THE SUPERVISOR WAS VOLUNTARY OR COERCED AND WHETHER ANY SEXUAL OVERTURES OR REMARKS WERE WELCOME OR UNWELCOME

Where a Title VII plaintiff alleges that a supervisor created a hostile work environment, the principle issues in the case are whether the sexual overtures or comments actually occurred and if so, whether they were "unwelcome" and created a hostile, intimidating or offensive work environment. 29 *C.F.R.* § 1604.11. In order to prove the existence of a hostile working environment and to corroborate her claim that the supervisor in fact engaged in the unwelcome behavior, the plaintiff employee should be freely permitted to introduce evidence that the supervisor harassed other women employees. This is consistent with the usual Title VII principle that a plaintiff can support her individual discrimination claim by proving a pattern of discrimination against members of the protected class to which she belongs. *See Grano v. City of Columbus,* 637 *F.*2d 1073, 1079 (6th Cir. 1980); *Stewart v. Campbell Soup Company,* 27 *Fair Empl. Prac. Cas.* (BNA) 972, 973 (N.D. Ohio 1981). Moreover, since there are rarely witnesses to any individual instance of sexual harassment, it would be highly prejudicial to plaintiff's case if she were not permitted to produce witnesses to corroborate her allegations that sexual harassment was occurring in the workplace. The defendant, however, should also be able to introduce evidence that the overtures or comments were not

in fact unwelcome. Evidence of the plaintiff's own behavior may be relevant to this issue.* *Gan v. Kepro Circuit Systems*, 28 *Fair Empl. Prac. Cas.* (BNA) 639 (E.D. Mo. 1982).

Similarly where a plaintiff alleges that sexual relations actually occurred between herself and the supervisor, the fact of the occurrence should not defeat her Title VII cause of action, nor should it preclude the employer from presenting a defense to that action. The crucial issue is whether the sexual relationship was voluntary or coerced. Defendant should therefore be able to introduce relevant evidence of plaintiff's actions or statements toward defendant that would tend to show that their relationship was voluntary. By the same token the plaintiff should be able to show evidence that the relationship was coerced, including testimony of other women regarding the supervisor's efforts to coerce them into having sexual relations with him.

CONCLUSION

For the foregoing reasons, this Court should adopt the holding of the Court of Appeals that unwelcome sexual advances or other forms of sexual harassment that create a hostile, intimidating or offensive work environment for an employee violate Title VII. It is also respectfully requested that this Court adopt the rule that an employer is

* California law goes further than federal law in specifically defining what constitutes relevant evidence in such cases. *Cal. Evid. Code* § 1106; *Cal. Gov't. Code* § 11513(c).

vicariously liable for a hostile working environment which is created by a supervisor and that liability should be imposed whenever necessary to provide a complete remedy for the victim of sexual harassment.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

Interests of Amici Curiae 1

Women's Bar Association of Massachusetts 1

Minnesota Women Lawyers, Inc. 1

Women Lawyers Association of Michigan 2

Colorado Women's Bar Association 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. SEXUAL HARASSMENT IS PERVASIVE IN THE WORKPLACE AND INCLUDES A WIDE VARIETY OF CONDUCT THAT IS OFFENSIVE AND UNWELCOME 4

A. Sexual Harassment of Working Women is Epidemic 5

B. Sexual Harassment Includes a Wide Variety of Conduct That is Unwelcome and Offensive 7

C. Sexual Harassment is Not Social or Courting Behavior 11

II. SEXUAL HARASSMENT THAT ADVERSELY AFFECTS THE VICTIM'S EMPLOYMENT OPPORTUNITIES VIOLATES TITLE VII 14

A. Sexual Harassment That Adversely Affects Employment-Related Benefits Violates Title VII 14

B. Sexual Harassment Constitutes An Unlawful Condition of Employment When It Unreasonably Interferes With An Individual's Work or Creates An Offensive Work Environment 17

C. Sexual Harassment is Conduct That Discriminates "Because of Sex" in Violation of Section 703(a)(1) 23

CONCLUSION 29

APPENDIX A-1

TABLE OF AUTHORITIES

CASES	PAGE
Ambrose v. United States Steel Corp., 39 Fair Empl. Prac. Cas. (BNA) 30 (N.D. Cal. 1985)	19, 21
Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)	15, 24
Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980)	6, 18
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)	6, 19, 24
Calcote v. Texas Educational Foundation, Inc., 578 F.2d 95 (5th Cir. 1978)	19, 24, 26
Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977)	19, 26
Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982)	8, 19
Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976)	19
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Hishon v. King & Spaulding, U.S. , 104 S.Ct. 2229 (1984)	18

CASES	PAGE
Horn v. Duke Homes Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985)	15
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Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979)	15
Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D. Tenn. 1981)	25
Muller v. Oregon, 208 U.S. 412 (1907)	5
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Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983)	10

CASES — PAGE

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 24
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Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984) 19
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Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) .. 10, 16
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STATUTES AND REGULATIONS

Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.* (1982) 15
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INTERESTS OF AMICI CURIAE

The Women's Bar Association of Massachusetts, Minnesota Women Lawyers, Inc., the Women Lawyers Association of Michigan, and the Colorado Women's Bar Association respectfully submit this brief as amici curiae in support of the decision below. The consents of counsel for the petitioner and the respondent have been filed with the Court.

Women's Bar Association of Massachusetts

The Women's Bar Association of Massachusetts ("WBA"), founded in 1978, is an organization that seeks to promote the professional advancement of women attorneys and to deal with the problems that women attorneys face in their professions and the workplace. The organization also seeks to protect and promote the interests of women generally. The WBA submits this brief in support of the judgment below because of its great concern with the prevalence of sexual harassment in the workplace. Such harassment, when found within the legal profession itself, constitutes an invidious barrier to the professional advancement of women attorneys. Sexual harassment clearly has a deleterious effect upon the lives of other women whose interests the WBA seeks to promote. The WBA's participation as an amicus in this case, as in the case of *Hishon v. King & Spalding,* U.S. , 104 S. Ct. 2229 (1984), reflects its view of the critical importance of Title VII as a means to eliminate from the workplace all vestiges of sex discrimination.

Minnesota Women Lawyers, Inc.

Minnesota Women Lawyers, Inc. ("MWL") is a non-profit organization with over 500 members, founded in 1972. MWL is committed to enhancing the status, influence, and effectiveness of women lawyers. MWL provides educational, legislative, and support services to its members. MWL has commissioned a comprehensive study of the legal profession, which examined career patterns, leadership roles, salaries, and working conditions. MWL sponsors educational programs for Continuing Legal Education credit, which have included dis-

cussions concerning sexual harassment. MWL annually adopts a legislative program and actively lobbies at the Minnesota state legislature. Past legislative programs have included the Equal Rights Amendment, advancement of women in business, judicial appointments, child support, domestic abuse, and reproductive freedom. MWL has a particular interest in eradicating barriers to the advancement of women in legal profession. Sexual harassment and discrimination against professional women and law students hinders such advancement.

Women Lawyers Association of Michigan

The Women Lawyers Association of Michigan ("WLAM") is an organization of more than one thousand Michigan lawyers. WLAM was founded in 1919 "to secure the rights of women in society and advance the interests of women members of the legal profession, to promote improvements in the administration of justice, to promote equality and justice for all people, and to improve relations between the legal profession and the public." WLAM has a long-standing commitment to the advancement and protection of the rights of all women. Sexual discrimination as well as sexual harassment against women in the workplace is a common occurrence which hinders their full career development and advancement. The WLAM strongly supports efforts to eradicate this discriminatory treatment of women.

Colorado Women's Bar Association

The Colorado Women's Bar Association ("CWBA") is a nonprofit organization of approximately 550 attorneys, with membership open to all attorneys regardless of sex, race, creed, religion, and national origin. The CWBA was formed to promote the highest standards of the legal profession, to advance justice, to promote and protect the interests and welfare of women, and to pursue these goals through appropriate legal, social, and political action. The CWBA supports efforts to assure that every woman will enjoy a working environment free from illegal sex discrimination.

SUMMARY OF ARGUMENT

Sexual harassment is pervasive in the workplace. Sexual harassment includes a wide variety of sexually-oriented words or conduct and is, by definition, offensive and unwelcome to the victim and to most people working around her. Experts agree that sexual harassment is not an expression of social or courting behavior. Rather, it is an assertion of power by the harasser who forces unwanted sexual attentions on a victim who cannot refuse such attentions without risking employment-related reprisals.

Sexual harassment has a profound, deleterious impact on working women and denies them equal opportunities in the workplace in contravention of Title VII. When a woman is denied a tangible job benefit such as a promotion or a raise because of her refusal to give in to sexual demands, the necessary nexus between sexually harassing conduct and an adverse effect on the terms and conditions of the woman's employment is self-evident. Virtually all lower courts agree that Title VII outlaws this form of economic-sexual coercion, which the courts call "*quid pro quo*" harassment.

Even where the sexually harassing conduct is not tied to a tangible job benefit, it prevents women from succeeding in the workplace for reasons wholly unrelated to women's merit or the requisites of the job. Sexual harassment that shatters the victim's psychological well-being or causes physical illness unreasonably interferes with a woman's performance on the job. Sexual harassment also poisons the work environment of the victim and those around her. In such "hostile work environment" cases, sexual harassment creates an unlawful condition of employment that denies women equal employment opportunities in violation of Title VII.

Sexual harassment constitutes discrimination "because of sex" within the meaning of Title VII because were it not for a woman's gender she would not be subjected to unwanted sexual attentions. Sexual harassment is also conduct which is intentionally discriminatory. The unlawful discriminatory intent can be inferred from the nature of the sexually harassing

words and conduct just as a racially discriminatory animus can be inferred from racially discriminatory words and conduct.

In short, sexual harassment erects artificial and arbitrary barriers to the advancement of women that are just as invidious as those which this Court has consistently struck down in the past. Amici urge this Court to confirm that sexual harassment that results in the loss of a tangible job benefit is unlawful. Moreover, we urge the Court to hold that sexual harassment that has more subtle (and thus more insidious) disparate effects on women in employment is equally unlawful.

ARGUMENT

I. SEXUAL HARASSMENT IS PERVASIVE IN THE WORKPLACE AND INCLUDES A WIDE VARIETY OF CONDUCT THAT IS OFFENSIVE AND UNWELCOME

Amici devote the first section of their argument to an extended discussion of the extent and nature of sexual harassment in the workplace in an effort to put to rest many of the myths regarding sexual harassment and its effects on the workplace. We are aided in this discussion by the findings of many empirical studies.[1] Some of the arguments commonly advanced by parties such as the petitioner Meritor Savings

[1] Although these studies are not part of the record below we bring them to the Court's attention as "published material containing facts which bear upon [the case]." R. Stern and E. Gressman, *Supreme Court Practice* 717 (5th Ed. 1978). *See also Muller v. Oregon*, 208 U.S. 412, 421 (1907). A brief description of some of the empirical studies cited in the brief appears in the Appendix.

Bank, FSB ("the Bank"), and its supporting amici, rest upon these myths and therefore their analysis which follows is fatally flawed.

A. *Sexual Harassment of Working Women is Epidemic*

Sexual harassment of working women is epidemic.[2] The most reliable random sample studies indicate that at least half of all working women have been subjected to sexual harassment in the workplace.[3] Although sexual harassment has only recently become a topic of general discussion,[4] it has plagued women for as long as they have worked.[5]

There is virtually no area of professional endeavor where women have not been subjected to sexual harassment. Women police dispatchers have experienced unwanted harassment. *E.g., Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982);

[2] Because the interest of these amici is to ensure that women in particular secure the equal employment opportunities guaranteed them under Title VII, the focus of this brief is on the adverse effects of sexual harassment on working women. Nevertheless, we wish to make clear at the outset that we are equally committed to the eradication of sexual harassment of working men, recognizing that, like us, men are demeaned by sexual harassment and are prevented by such harassment from realizing their full employment potential in the workplace.

[3] *See* B. Gutek, *Sex and the Workplace* 46 (1985) (53% of respondents had been sexually harassed); Office of Merit Systems Review and Studies, U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace—Is It a Problem?* 33-35 (1981) ["Merit Systems Protection Board Survey"] (42% of women federal employees had been sexually harassed on the job).

[4] Safran, *What Men Do To Women on the Job: A Shocking Look at Sexual Harassment*, Redbook, November 1976, at 149 ["Redbook Survey"]. The Redbook Survey of 9,000 women respondents was the first article to expose sexual harassment of working women to the public view and to plumb the depths of the problem. Thus, despite the admittedly "popular" form of the journal and the methodological deficiencies of the study, no review of the literature on sexual harassment would be complete without an acknowledgment of the Redbook Survey.

[5] L. Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* 28-44 (1978) ["Farley"].

Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980). Air traffic controllers, *e.g.*, *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983), nurses, *e.g.*, *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985), vocational rehabilitation specialists, *e.g.*, *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) and rental car agency representatives, *e.g.*, *Sones-Morgan v. Hertz Corp.*, 725 F.2d 1070 (6th Cir. 1984), have all been victimized by sexual harassment. Women jockeys have been driven from the profession by pervasive unwanted harassment.[6] Blue collar union workers,[7] factory autoworkers,[8] and women truck drivers[9] all report that sexual harassment is part and parcel of their work.

Particularly troublesome to these amici is the fact that women attorneys[10] and other professional women in traditionally male-dominated professions such as medicine, engineering, science, law enforcement, and the military, are more likely to be harassed than women in "traditional" careers and are likely to be subjected to more severe forms of harassment.[11] Studies

[6] Farley reports that at least two top women jockeys have prematurely left the profession because, as one said: "If you don't cooperate sexually, you don't get the [good horses]—it's that simple." Farley, *supra* note 5, at 60-61.

[7] Maypole & Skaine, *Sexual Harassment of Blue Collar Workers*, 9 J. Sociology and Soc. Welfare 682 (1982) ["Maypole"].

[8] Gruber & Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 Work and Occupations 271 (1982) ["Gruber"].

[9] Lembright & Riemer, *Women Truckers' Problems and the Impact of Sponsorship*, 9 Work & Occupations 457 (1982) ["Lembright"].

[10] Women attorneys comprised only 2.5% of the legal population in the 1960's. Epstein, *The New Women and the Old Establishment: Wall Street Lawyers in the 1970's*, 7 Sociology of Work & Occupations 291, 291 (1980). Despite significant progress, today women attorneys are a distinct minority of 16% of all practitioners. National Law Journal, December 23, 1985, at 6, col. 1, citing United States Department of Labor statistics.

[11] For example, 53% of women in nontraditional jobs reported being sexually harassed as compared to only 41% of women in traditional jobs. Merit Systems Protection Board Survey, *supra* note 3, at 50-51; Tangri, Burt, and Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. Soc. Issues 33, 44 (1982) ["Tangri"]; Hemming, *Women in a Man's World: Sexual Harassment*, 38 Hum. Relations 67, 75 (1985) ["Hemming"].

also show that the higher a woman's educational level, the more likely she is to be harassed.[12] Since professional women must necessarily pursue graduate degrees to enter their chosen careers, they unwittingly expose themselves to a higher likelihood of harassment by making a simple career decision.

B. *Sexual Harassment Includes a Wide Variety of Conduct That is Unwelcome and Offensive*

Sexually harassing conduct includes a continuum of conduct ranging from rape,[13] sexual assault or deliberate sexual touching to pressure for sexual favors or dates, sexual remarks, letters or phone calls, and suggestive looks or leering.[14] The Guidelines of the Equal Employment Opportunity Commission (the "EEOC"), the most often cited legal definition, recognize that a panoply of conduct falls within the rubric "sexual harassment" and includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . . ." 29 C.F.R. § 1604.11(a) (1984).

The most blatant form of sexual harassment occurs when an employer coerces sexual relations from an employee in exchange for a tangible job benefit. This type of conduct has been termed "sexual bribery."[15] (Lower courts have coined the term "*quid pro quo*" harassment to cover this type of conduct.) Empirical studies indicate that this extreme expression of sexual harassment accounts for only a small per-

[12] The highest incidence of sexual harassment was reported by women with some graduate school education (53%). Fifty percent of women with college degrees and 48% of women with graduate or professional degrees also reported being victims of harassment. Merit Systems Protection Board Survey, *supra* note 3, at 44-45.

[13] One out of every one hundred women in the workplace has been raped or sexually assaulted on the job. Merit Systems Protection Board Survey, *supra* note 3, at 37; Maypole, *supra* note 7, at 689. No less shocking is the fact that .3% of male workers surveyed have been victims of rape or sexual assault at work. Merit Systems Protection Board Survey, *supra* note 3, at 37.

[14] Merit Systems Protection Board Survey, *supra* note 3, at 37; Gutek, Nakamura, Gahart, Handschumacher & Russell, *Sexuality and the Workplace*, 1 Basic & Applied Soc. Psychology 255, 257 (1980) ["Gutek"].

[15] Seventy-nine percent of men and 83% of women surveyed consider this type of conduct "a form of rape." Maypole, *supra* note 7, at 686-87.

centage of the sexually harassing conduct that adversely affects women in their employment.[16]

Instead, most women experience verbal harassment such as unwanted sexual propositioning, offensive remarks about a woman's body, sexual proclivities or activities, and "off color" jokes. *E.g., Coley v. Consolidated Rail Corp.*, 561 F. Supp. 645, 647 (E.D. Mich. 1982) (plaintiff's supervisor persistently commented on the size of her "boobs," kept track of her menstrual periods on his office calendar and made remarks about her moods in relation thereto and repeatedly asked her when she was going to "do something nice for him"); *Robson v. Eva's Super Market*, 538 F. Supp. 857, 861 (N.D. Ohio 1982) (plaintiff's supervisor "offered her money to engage in sexual relations with him, asked her to wear 'tight jeans' to work, directed her to perform work tasks in his presence so he could 'watch her walk by,' . . . [and] falsely told other employees in the store that he had engaged in sexual conduct with the plaintiff"). The Merit Systems Protection Board Survey reports that verbal sexual harassment accounts for 59% of all incidents of harassment experienced.[17]

Many women also report that they are subjected to unwanted touching.[18] *See, e.g., Glasgow v. Georgia Pacific Corp.*, 103 Wash. 2d 401, 402, 693 P.2d 708, 710 (Wash. 1985) (plaintiff's co-worker "would place his hands on [her] hips and rub his crotch up across her backside as he was passing;" he

[16] Only 9% of the respondents in the Merit Systems Protection Board Survey reported experiencing pressure for sexual favors. Merit Systems Protection Board Survey, *supra* note 3, at 37. *Accord* Tangri, *supra* note 11, at 47.

[17] Merit Systems Protection Board Survey, *supra* note 3, at 37. Maypole reports that 86% of the incidents reported by a small sample of blue collar workers included verbal sexual abuse. Maypole, *supra* note 7, at 692. *See also* Gruber, *supra* note 8, at 283 (verbal sexual harassment accounts for 61.3% of all reported incidents of harassment).

[18] The Merit Systems Protection Board Survey showed that unwanted touching amounted to 15% of all sexually harassing experiences. Merit Systems Protection Board Survey, *supra* note 3, at 37. Maypole found that 48% of women respondents polled experienced unwanted touching. Maypole, *supra* note 7, at 689.

also grabbed her breast on one occasion and on another occasion, grabbed her buttocks from behind.)[19] Women are also often victims of "cornering," i.e., they are backed up against walls, forced to stay in closed offices or pinned behind desks by an intimidating harasser who may not even touch them.[20] Together these types of more moderate verbal and physical harassment account for 74% of all reported incidents of harassment.[21]

One single factor distinguishes sexual conduct that is acceptable to workers from sexual conduct that is perceived by workers as "sexual harassment": the latter conduct is uninvited, unwelcome.[22] Thus, by its very definition, sexual harassment is distinguished from the more innocent forms of social-sexual conduct which naturally occur in the workplace, i.e., flattery and dating or courting behavior.[23]

Some forms of sexual harassment are so abusive that they are presumptively "unwelcome" and offensive. For example, rape, which is universally recognized as a criminal act, is clearly "unwelcome" conduct in the workplace. Similarly, in *Katz v. Dole*, the Fourth Circuit noted that the "extremely vulgar and

[19] *Glasgow* was brought under a Washington state sex discrimination statute modeled after Title VII. Wash. Rev. Code § 49.60.

[20] Merit Systems Protection Board Survey, *supra* note 3, at 34-37.

[21] *Id.* at 37.

[22] The Merit System Protection Board Survey polled federal employees to determine what conduct they believed to be sexual harassment. The Survey concluded that "[s]ubstantial agreement existed among Federal workers that *uninvited* behaviors of a sexual nature constitute sexual harassment." Merit Systems Protection Board Survey, *supra* note 3, at 26 (emphasis supplied). Indeed, 93% of women and 87% of men considered unwanted sexual attentions from a supervisor to be harassment, and 87% of women and 76% of men considered unwanted sexual attentions from co-workers to be harassment. *Id.* at 26-27. The EEOC Guidelines begin with the proposition that sexual harassment is sexual conduct which is "unwelcome." 29 C.F.R. § 1604.11(a) (1984).

[23] Other sexual conduct can amount to sexual harassment even though it is not, strictly speaking, "unwelcome" to the recipient. For example, consensual sexual activity between a supervisor and employee can amount to sex discrimination towards other employees if the sexually-favored employee receives employment benefits not granted to other women who qualify for the benefits. *See, e.g., King v. Palmer*, 778 F.2d 878 (D.C. Cir.), *reh'g denied*

offensive sexually related epithets" that were addressed to the plaintiff were words that are "widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from the 'disgust and violence they express phonetically.'" *Katz*, 709 F.2d 251, 254 (4th Cir. 1983) (quoting C. Miller and K. Swift, *Words and Women* 109 (1977)). *See also Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 783 (E.D. Wis. 1984).

Most forms of sexual harassment are offensive and unwelcome to the victims. A majority of women find unwanted sexual attentions demeaning, embarassing, and intimidating.[24] Women overwhelmingly report feeling angry, upset, frightened, and guilty when victimized by sexual harassment.[25] One woman voiced the feelings of many women when she said: "Sexual harassment is . . . [a] way of saying you're a nonperson, only a sexual object. . . . [I]t's completely humiliating, one of the toughest things to fight. It dehumanizes you when people are grabbing at you and yelling obscenities."[26]

If, however, it is not immediately apparent whether the victim of sexual harassment considered the conduct "unwelcome," traditional evidentiary inquiries will resolve the question. *Williams v. Saxbe*, 413 F. Supp. 654, 660 (D.D.C. 1976),

(Jan. 22, 1986), *reh'g en banc denied* (Jan. 22, 1986); *Toscano v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983). *See also* 29 C.F.R. § 1604.11(g) (1984). This sort of conduct is "unwelcome" in the sense that the complaining employee regards the conduct as undesirable or offensive. The conduct is unlawful since it imposes an implicit requirement that an employee make herself sexually available if she wishes to be eligible for employment benefits.

[24] Redbook Survey, *supra* note 4, at 217; Renick, *Sexual Harassment at Work: Why It Happens, What to Do About It*, 59 Personnel J. 659, 660 (1980) ["Renick"] (citing a study conducted by the Illinois Task Force on Sexual Harassment and the results of a study by Working Women's United Institute in New York). Merit Systems Protection Board Survey, *supra* note 3, 79-84.

[25] Jensen & Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. of Soc. Issues 121, (1982) ["Jensen"]; Renick, *supra* note 24, at 660; Redbook Survey, *supra* note 4, at 149, 217; Hemming, *supra* note 11, at 69; B. Gutek, *Sex and the Workplace* 71 (1985).

[26] Maypole, *supra* note 7, at 683 (quoting C. Backhouse and L. Cohen, *Sexual Harassment on the Job* 13 (1981)).

rev'd and remanded sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1976), *on remand sub nom. Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980). Amici urge the Court to adopt the test suggested by a commentator: "The proper perspective is the objective one of the reasonable victim." Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1459 (1984). A similar standard has long been applied with respect to the torts of assault and battery and the standard reflects sensitivity to the victim, subject to the reasonableness of the average person. *See generally* W. Prosser, *Law of Torts* §§ 9 and 10 (4th Ed. 1971).

C. *Sexual Harassment Is Not Social or Courting Behavior*

Sexual harassment is *not* an expression of social or courting behavior.[27] Rather, sexual harassment is an assertion of power by the harasser over the victim where the weapon is unwanted sexual attentions and the harasser's leverage over the victim is his ability to affect her work.[28] This theory, called "the power dominance theory,"[29] is buttressed by statistics. Women, for example, are two and a half times more likely to be harassed by supervisors than are their male colleagues.[30] Younger women[31] and single or divorced women[32] experience harassment more frequently than their less vulnerable colleagues. The power dominance theory also draws support from statistics which indicate that the higher a women's educational level and the more male-dominated her profession,[33] the more likely she will be victimized by sexual harassment.

[27] Merit Systems Protection Board Survey, *supra* note 3, at 101.

[28] Maypole, *supra* note 7, at 683.

[29] Maypole, *supra* note 7, at 682, 686, 694; Renick, *supra* note 24, at 662; Tangri, *supra* note 11, at 38-39.

[30] Tangri, *supra* note 11, at 45. Maypole and Skaine report that 19% of women polled reported that they were harassed by their bosses whereas only 6% of male respondents reported being victimized by their bosses. Maypole, *supra* note 7, at 689. *Accord* Merit Systems Protection Board Survey, *supra* note 3, at 60.

[31] Tangri, *supra* note 11, at 33, 44. *Accord* Merit Systems Protection Board Survey, *supra* note 3, at 43.

[32] Tangri, *supra* note 11, at 43. *Accord* Merit Systems Protection Board Survey, *supra* note 3, at 43-44.

[33] See nn. 11 and 12 and accompanying text above. The Merit Systems Protection Board Survey suggests that this may be because "men see women

While other motivational theories have been suggested,[34] all experts agree that sexual harassment is *not* the sort of sexual activity which the Bank regards as "socially acceptable and wholly unrelated to the job." Brief of Petitioner Meritor Savings Bank, FSB ("Bank Brief") at 10. Nor is it conduct which is intended to be "complimentary" or merely "innocuous." Brief of Amici Curiae Justice Department and Equal Employment Opportunity Commission in Support of the Bank, typescript version ("Justice-EEOC Brief") at 13. Instead, it is conduct like "racially or religiously derogatory workplace activity," which even the Bank concedes "cannot reasonably be conceived as occupationally neutral or desirable." Bank Brief at 10.

It is a myth of common currency that if Title VII is construed to outlaw sexual harassment, it may " 'discourage' sexual relationships between consenting co-workers" or "intrude on 'purely personal, social relationship[s].' ". Justice-EEOC Brief at 14 (citations omitted). The Bank, in its brief, cautions that sex is somehow different from other Title VII classifications and says: " 'Sexual advances may not be intrinsically offensive. . . .' " Bank Brief at 27 (citation omitted). The Bank also attempts to distinguish racial harassment from sexual harassment by saying that the latter involves "social patterns that to some extent are normal and acceptable." *Id.* (citation omitted). *See also* Brief of Amicus Curiae Chamber of Commerce of the United States in Support of the Bank ("Chamber of Commerce Brief") at 11. Simply put, the Bank, the Justice Department, the EEOC, and the Chamber of

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entering their 'territory' as a threat, [so men] respond by using sexual harassment to try to limit the women's success or to get them to leave." Merit Systems Protection Board Survey, *supra* note 3, at 50-51.

[34] Gutek suggests that sexual harassment is attributable to "sex role spillover" or the carrying over into the workplace of gender-related expectations (rather than employment-related expectations) about behavior. According to this view, women in the workplace are perceived more for their sexual attributes than their employment attributes. Thus, particularly where a woman enters a male-dominated profession, she is perceived and treated differently as "a woman in a man's job." Where the form of the different treatment is unwanted sexual attentions, this is sexual harassment. Gutek, B., *Sex and The Workplace* 129-152 (1985). *See also* Farley, *supra* note 5, at 28-51.

Commerce are wrong. Sexual harassment is *never* a form of acceptable social-sexual interaction.

The Merit Systems Protection Board Survey found that nearly half of women who are sexually harassed report that their harasser harassed *other* victims.[35] Presumably, if sexual harassment were a form of social-sexual attraction it would be directed towards one person to whom the putative harasser was attracted, rather than indiscriminately to a number of women. This statistic also undermines the idea that conduct which women consider to be sexual harassment is really intended as a form of personal, social interaction that the harasser unintentionally expresses in a maladroit fashion. Furthermore, two-thirds of all harassers are married men,[36] rather than single men who are more likely to engage in dating or courting behavior. Finally, the Merit Systems Protection Board Survey indicates that women experience sexual harassment repeatedly, and that most incidents of harassment last a week or more and a "sizeable percentage persist for *more than six months.*"[37] Normal social-sexual relations are consensual. The fact that these unrequited advances are repeated, and are repeated over a long period of time despite the woman's withholding of her consent, indicates that they are *not* the sort of normal social relations that are properly outside the purview of Title VII.

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[35] Merit Systems Protection Board Survey, *supra* note 3, at 60. We commend to the Justice Department the federal government's own study of sexual harassment in the workplace—the Merit Systems Protection Board Survey. In light of the Survey's finding that sexual harassment of federal workers cost the government a total of $189 million over a two-year period, *id.* at 76-79, we are at a loss to understand the government's participation as amicus for the Bank in this case. We are, of course, aware that the government purports to address the hostile work environment claim only because the court of appeals supposedly reversed the lower court's judgment without finding that the lower court's findings were clearly erroneous. Justice-EEOC Brief at 16-20. We suggest, however, that such a position is more commonly, and more appropriately, advanced by counsel for a party and not by the United States Government under the guise of "a friend of the court."

[36] Merit Systems Protection Board Survey, *supra* note 3, at 59-60.

[37] *Id.* at 38-39 (emphasis supplied).

In sum, sexual harassment includes many types of conduct that may or may not be overtly sexual. Harassment is intrinsically unwelcome or can be shown to be unwelcome from the facts and circumstances surrounding the conduct. It is rarely confused by the recipient or those around her with acceptable forms of social-sexual interaction. Sexual harassment is *unlawful*—as opposed to being simply reprehensible—when it adversely affects the victim in her work. As we explain below, sexual harassment has profound, negative consequences on women in the workplace and because of those negative consequences, it is unlawful.

II. SEXUAL HARASSMENT THAT ADVERSELY AFFECTS THE VICTIM'S EMPLOYMENT OPPORTUNITIES VIOLATES TITLE VII

This Court need not even consider whether sexual harassment that results in the loss of a tangible job benefit violates Title VII since the district court found, and the appeals court agreed, that Ms. Vinson was not denied any promotions, bonuses, salary or other tangible job benefits. The narrow question in this appeal is whether sexual harassment that does not affect "tangible" job benefits, but which seriously affects intangible employment conditions, violates Title VII. Though the Bank and all amici submitting briefs on its behalf concede that sexual harassment that results in the loss of a tangible job benefit violates Title VII, we provide here a brief analysis of this area of the law. Such an analysis is necessary to an understanding of why sexual harassment that creates a hostile work environment is equally discriminatory.

A. *Sexual Harassment That Adversely Affects Employment-Related Benefits Violates Title VII*

Sexual harassment cases have been analyzed traditionally as disparate treatment claims. In order to make out a disparate treatment claim of sexual harassment, the victim must show she was treated "less favorably" than others because of her sex. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1976). Although this Court has never before had the opportunity to consider the issue, the lower courts have recognized for many years that sexual harassment can be a powerful tool used

to deny women equal "compensation, terms, conditions, or privileges" of employment.[38] 42 U.S.C. § 2000e-2(a)(1) (1982) ("Section 703(a)(1)"). *See generally* B. Schlei and P. Grossman, *Employment Discrimination Law* 421-429 (1983) and cases cited therein. The early sexual harassment cases were called *quid pro quo* claims of discrimination. Literally translated, *quid pro quo* means "something for something" and these cases present the "almost tediously familiar"[39] scenario where a woman is denied a tangible job benefit after she rebuffs unwelcome sexual advances from a supervisor.[40]

The early cases presented the courts with "bright line" situations. The harassing conduct at issue was often explicitly sexual in content and the grant of an obvious—or "tangible"—employment benefit was usually offered to the employee-plaintiff in exchange for her having sexual relations with the supervisory employee.[41] Yet many so-called *quid pro quo* cases do not involve this type of explicit sexual coercion. Instead they present situations where "submission to or rejec-

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[38] The statute provides in relevant part:

> It shall be an unlawful employment practice for an employer
>
> • • •
>
> (1) . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ..

42 U.S.C. § 2000e-2(a)(1)(1982).

[39] C. MacKinnon, *Sexual Harassment of Working Women* 73 (1979).

[40] A "tangible job benefit" can be initial hiring or continued employment, a promotion, or a raise. *Tomkins v. Public Service Electric and Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977) (promotion); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (continued employment). *See also Horn v. Duke Homes Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D. Colo. 1978).

[41] The EEOC shares the courts' view that such conduct violates Title VII. As the Guidelines note: "Unwelcome sexual advances, requests for sexual favors . . . constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment . . . ." 29 C.F.R. § 1604.11(a)(1)(1984).

tion of such [sexually harassing] conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a)(2) (1984).

In these latter cases, employees experience some sort of adverse, employment-related treatment for refusing unwanted sexual attentions. For example, women employees have received worse performance appraisals after refusing a supervisor's advances than they received before the unwanted advances. *See Tomkins v. Public Service Electric and Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *EEOC Decision No. 81-18*, EEOC Decisions (CCH) ¶ 6758 (1983) at 4809-10. Other women have been subjected to unwarranted reprimands and have been purposefully kept ignorant about business matters important to the proper exercise of their employment responsibilities.[42] *E.g., Williams v. Civiletti*, 487 F. Supp. 1387, 1389 (D.D.C. 1980) (unwarranted criticism of plaintiff's work); *McKinney v. Dole*, 765 F.2d 1129, 1132 (D.C. Cir. 1985) (plaintiff alleged that harassing supervisor intentionally mislaid a personnel qualification form to ensure she would not be considered for a position to which she applied); *Robson v. Eva's Super Market Inc.*, 538 F. Supp. 857, 861 (N.D. Ohio 1982) (plaintiff's rejection of her supervisor's sexual advances was used by him as a basis for "assigning her more onerous tasks and by generally 'penalizing' her at work."); *EEOC Decision No. 81-17*, EEOC Decisions (CCH) ¶ 6757 (1983) at 4799 (charging party was subjected to unwarranted criticism after rejecting her supervisor's advances and was forced to wear a sexually revealing costume at work for male visitors).[43]

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[42] This sort of sexually-motivated employment sabotage often paves the way for the employer to fire the employee, ostensibly for failing to carry out her work responsibilities. *See, e.g., Lamb v. Drilco Div.*, 32 Fair Empl. Prac. Cas. (BNA) 105, 107 (S.D. Tex. 1983); *Williams v. Saxbe*, 413 F. Supp. 654, 662 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *on remand sub nom. Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980) (after the plaintiff rejected her supervisor's sexual demands, he "began a program of . . . criticism designed to have her employment terminated . . . [H]e had retaliated by creating a basis for her discharge from the agency").

[43] Maypole and Skaine reported that, according to a Working Women United Institute study, 25% of women who had been harassed "were penalized by reprimands, sabotage of their work, or both." Maypole & Skaine, *Sexual Harassment in the Workplace*, 1983 Social Work 385, 386.

Thus, the lower courts have found sexual harassment to violate Title VII when there is a nexus between unwanted sexual conduct and negative employment treatment of the victim, whether the employee is denied a "tangible" job benefit or some other employment-related benefit. Amici contend that less overtly coercive forms of sexual harassment also result in disparate treatment of women workers by interfering with their individual performance or by creating a "hostile" work environment in the workplace. Since the impact on the employee in a "hostile work environment" case is not as obvious as in a tangible job benefits case, amici have drawn from empirical data to demonstrate to the Court the actual, quantifiable effects of this subtle form of discrimination.

B. *Sexual Harassment Constitutes An Unlawful Condition of Employment When It Unreasonably Interferes With An Individual's Work or Creates An Offensive Work Environment*

Only one out of every ten victims of sexual harassment is denied a discrete employment-related benefit of the sort described above.[44] Most of the victims of harassment experience more subtle, but no less harmful effects on their work.[45] The question presented to this Court is whether the scope of Title VII's protection extends over the remaining nine out of ten victims of sexual harassment in the workplace when the harassment has a discernible negative impact on women's

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[44] Tangri, *supra* note 11, at 48. Less than 10% of the persons experiencing sexual harassment reported that they were fired, reassigned, or denied promotions, pay increases, or impartial performance appraisals as a result of sexual harassment. *See also* Merit Systems Protection Board Survey, *supra* note 3, at 79-80.

[45] Furthermore, the majority of workers are harassed by co-workers rather than by supervisors in a position to grant or deny employment-related benefits. Sixty-five percent of women reported being harassed by co-workers as compared to 37% who were harassed by their supervisors. (Some respondents were harassed by more than one party.) Seventy-six percent of men were harassed by co-workers as compared to 14% who were harassed by supervisors. Merit Systems Protection Board Survey, *supra* note 3, at 59-60. *Accord* Tangri, *supra* note 11, at 45; Maypole, *supra* note 7, at 692.

work, even though discrete employment-related benefits are not affected.

This Court recently recognized that the phrase "terms, conditions, or privileges of employment" includes all aspects of employment that an employer offers to employees and noted that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon v. King & Spaulding,* U.S. , , 104 S.Ct. 2229, 2234 (1984). Chief Justice Burger, writing for a unanimous Court, explained that Congress intended to guarantee equal employment opportunities as to *all* "incidents of employment." *Id.* at , 104 S.Ct. at 2234 n.7.

Hishon, of course, dealt with the question of whether the defendant law partnership was obliged to offer the "privilege" of entry into its partnership in a nondiscriminatory manner. Nevertheless, amici maintain that a similar analysis is appropriate with respect to the "conditions" of employment imposed by employers on their employees. We contend that if an employer confers upon its male employees a nondiscriminatory, non-sexually intimidating environment, then it obliges itself to guarantee an equally inoffensive environment to women employees. A sexually intimidating work environment, or an environment that is hostile to women due to pervasive sexual harassment, amounts to an unlawful condition of employment imposed on women, but not on men, in the workplace.

The lower courts have recognized that pervasive sexual harassment that poisons a work atmosphere amounts to an unlawful "condition" of employment in violation of Section 703(a)(1) of Title VII. As one court explained, "sexual harassment that permeates the workplace . . . creat[es] an intimidating, hostile or offensive working environment [and is] an impermissible condition of employment." *Brown v. City of Guthrie,* 22 Fair Empl. Prac. Cas. (BNA) 1627, 1632 (W.D. Okla. 1980). *Accord McKinney v. Dole,* 765 F.2d 1129, 1138 (D.C. Cir. 1985); *Katz v. Dole,* 709 F.2d 251, 254 (4th Cir. 1983); *Henson v. City of Dundee,* 682 F.2d 897, 901 (11th Cir.

1982); *Bundy v. Jackson,* 641 F.2d 934, 943-44 (D.C. Cir. 1981); *Jeppsen v. Wunnicke,* 611 F. Supp. 78, 79-80 (D. Alaska 1985); *Ambrose v. United States Steel Corp.,* 39 Fair Empl. Prac. Cas. (BNA) 30, 34 (N.D. Cal. 1985); *Zabkowicz v. West Bend Co.,* 589 F. Supp. 780, 783 (E.D. Wis. 1984); *Coley v. Consolidated Rail Corp.,* 561 F. Supp. 645, 649 (E.D. Mich. 1982); *Robson v. Eva's Super Market, Inc.,* 538 F. Supp. 857, 862 (N.D. Ohio 1982). The EEOC decisions are in accord. *See, e.g., EEOC Decision No. 81-18,* EEOC Decisions (CCH) ¶ 6758 (1983); *EEOC Decision No. 81-17,* EEOC Decisions (CCH) ¶ 6757 (1983).[46] As the Eleventh Circuit has pointed out: "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Henson,* 682 F.2d at 902.[47]

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[46] A work atmosphere which is permeated by racist insults or slurs has been held to violate employees' Title VII rights. *Rogers v. EEOC,* 454 F.2d 234 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972); *Calcote v. Texas Educational Foundation Inc.,* 458 F. Supp. 231 (W.D. Tex. 1976), *aff'd as modified,* 578 F.2d 95 (5th Cir. 1978). *See also EEOC Decision No. 72-1561,* 4 Fair Empl. Prac. Cas. (BNA) 852 (1972); *EEOC Decision No. 74-05,* 6 Fair Empl. Prac. Cas. (BNA) 834 (1973); *EEOC Decision No. 71-909,* 3 Fair Empl. Prac. Cas. (BNA) 269 (1970); *EEOC Decision No. YSF 9-108,* 1 Fair Empl. Prac. Cas. (BNA) 922 (1969). Courts and the EEOC have also found that Title VII guarantees employees a workplace free of religious derogation, *Weiss v. United States,* 595 F. Supp. 1050 (E.D. Va. 1984); *Compston v. Borden, Inc.,* 424 F. Supp. 157 (S.D. Ohio 1976); *EEOC Decision No. 72-1114,* EEOC Decisions (CCH) ¶6347 (1973), and ethnic slurs. *Cariddi v. Kansas City Chiefs Football Club, Inc.,* 568 F.2d 87 (8th Cir. 1977) (indicating that a pattern of offensive ethnic slurs would violate Title VII); *EEOC Decision No. 72-1561,* EEOC Decisions (CCH) ¶6354 (1973).

[47] There are few resources to aid this Court in determining whether Congress considers sexual harassment a form of sex discrimination under Title VII. Congress, however, has been aware of the problem of sexual harassment in employment since at least 1981. In January and April 1981, the Senate Committee on Labor and Human Resources held hearings on sexual harassment in employment "to focus public attention on the problem of sexual discrimination and harassment." Bureau of National Affairs, Inc., *Sexual Harassment and Labor Relations* 15 (1981). The Committee was particularly interested in determining whether the EEOC Guidelines prohibiting sexual harassment, which had been formally adopted a few months before, were effective in eliminating sexual harrassment. *Id.* Although five years have passed since those hearings, and nearly six years have elapsed since the EEOC

Empirical studies show that persistent sexual harassment affects women in such a way that the equal employment opportunities which are supposedly available to them are, in fact, out of reach. Persistent sexual harassment is psychologically demeaning to workers. Depression and a severely diminished self-image[48] are inevitable by-products of forced, unwanted sexual attention. Victims of sexual harassment also commonly report feelings of hatred and anxiety.[49] These feelings interfere with the victims' ability to work with others on the job,[50] and poison their attitudes towards co-workers and supervisors.[51] Sexual harassment also causes an increase in mental illness.[52]

The psychological debasement of women workers takes a physical toll as well. Women report a higher incidence of alcoholism, drug abuse, and cigarette consumption[53] as a result of sexual harassment. Common physical illnesses triggered by unwanted sexual attentions in the workplace include coronary heart disease,[54] gastro-intestinal illnesses, insomnia, head-

Guidelines were issued, Congress has taken no steps to exclude sexual harassment from conduct proscribed as sex discrimination under Title VII. It appears, then, that Congress is content with the position of the lower courts that sexual harassment is a form of prohibited sex discrimination.

[48] Renick, *supra* note 24, at 660. As Renick observes: "[T]he [victim's] feeling that she is not valued for her productivity, [accomplishments] or promise, but for her woman's body, can cast a pall of resentment and self-doubt over her working or academic career, if it does not drive her out of the pursuit altogether." *Id.* at 662. Tangri, *supra* note 11, at 48.

[49] Hemming, *supra* note 11, at 74; Renick, *supra* note 24, at 660 (and studies cited therein).

[50] Hemming, *supra* note 11, at 74; Tangri, *supra* note 24, at 48.

[51] Merit Systems Protection Board Survey, *supra* note 3, at 81-82; Gruber, *supra* note 8, at 288-289.

[52] Renick, *supra* note 24, at 660. In fact, the Merit Systems Protection Board Survey estimated that the cost to the federal government for use of health benefits due to emotional and physical stress associated with sexual harassment of women is $3.9 million. Merit Systems Protection Board Survey, *supra* note 3, at 77.

[53] Merit Systems Protection Board Survey, *supra* note 3, at 69; Renick, *supra* note 24, at 660; Hemming, *supra* note 11, at 69 (*quoting* Hadjifotiou, *Women and Harassment at Work* 20-21 (1983)).

[54] Hemming, *supra* note 11, at 69.

aches,[55] problems with weight and diet,[56] chronic fatigue,[57] and a variety of aches and pains.[58] *E.g., Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 783 (E.D. Wis. 1984) (plaintiff took extended sick leave suffering from diarrhea, vomiting, severe nausea, cramping, and inexplicable crying spells, which were diagnosed as "psychophysiological gastro-intestinal disease due to harassment at work"); *Phillips v. Smalley Maintenance Services*, 711 F.2d 1524, 1527, 1528 (11th Cir. 1983) (plaintiff contemplated suicide, suffered chronic anxiety, and developed difficulties relating to her family and friends as a result of her employer's "insist[ence] that she engage in oral sex with him at least three times a week."); *Ambrose v. United States Steel Corp.*, 39 Fair Empl. Prac. Cas. (BNA) 30, 33 (N.D. Cal. 1985) (plaintiff attempted suicide by ingesting Valium and alcohol); *Lamb v. Drilco Div.*, 32 Fair Empl. Prac. Cas. (BNA) 105, 106 (S.D. Tex. 1983) (plaintiff was unable to eat or sleep and eventually began to drink more alcohol than usual).

Contrary to the assertions of the Bank, sexual harassment that is not linked to tangible job benefits does have economic effects on the employee in her work. *See* Bank Brief at 11. Women subjected to harassment are likely to have worse attendance records and higher sick leave rates than other workers.[59] Higher absenteeism necessarily lowers women's productivity compared to their peers,[60] and lowered productivity ensures that women will not be as successful in the

[55] *Id.;* Jensen, *supra* note 25, at 130; Renick, *supra* note 24, at 660.

[56] Hemming, *supra* note 11, at 69 (*quoting* Hadjifotiou, *Women and Harassment at Work* 20-21 (1983)).

[57] Renick, *supra* note 24, at 660.

[58] *Id.;* Hemming, *supra* note 11, at 69 (*quoting* Hadjifotiou, *Women and Harassment at Work* 20-21 (1983)).

[59] Tangri, *supra* note 11, at 48; Gosselin, *Sexual Harassment on the Job: Psychological, Social and Economic Repercussions*, Canada's Mental Health, September 1984, at 21, 24 (1984); Renick, *supra* note 24, at 660; Merit Systems Protection Board Survey, *supra* note 3, at 77.

[60] Absenteeism due to sexual harassment can be costly to employers as well as employees. The cost to the federal government over a two year period caused by absenteeism due to sexual harassment was estimated at $7.9 million. Merit Systems Protection Board Survey, *supra* note 3, at 77.

workplace as employees who are not subjected to sexual harassment and who are, consequently, more productive.[61]

These intangibles have had a quantifiable, adverse impact on women in the workplace. The Merit Systems Protection Board Survey indicates that women's productivity fell by $70.3 million due to sexual harassment over a two year period.[62] Lowered productivity caused by sexual harassment of *both* male and female federal employees over the same period cost the government a staggering $149.0 million.[63]

Sexual harassment exacts other indirect costs from women workers. Approximately 10% of the victims of sexual harassment quit their jobs or transfer to escape sexual harassment.[64] In doing so, these women necessarily forfeit the opportunity for further training and promotions in the jobs of their choice.[65] The economic costs to women workers in the form of lost pension rights and sick leave have not been calculated but these losses are nonetheless real.[66] Many women no doubt are unable immediately to find new jobs and thus suffer lost wages that may not be compensable under worker's compensation statutes.[67]

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[61] One court has wisely acknowledged that a decline in the plaintiff's work performance (which the defendant cited as reason for her discharge) was directly attributable to the harassment she had suffered. Thus, the court said, "the discharge of Ms. Lamb was not legitimate because the Defendant employer created the problem initially." *Lamb v. Drilco Div.*, 32 Fair Empl. Prac. Cas. (BNA) 105, 107 (S.D. Tex. 1983).

[62] Merit Systems Protection Board Survey, *supra* note 3, at 77.

[63] *Id.*

[64] Eleven percent of women victims in a Cornell University study either quit or sought transfers to avoid sexual harassment. Farley, *supra* note 5, at 21-22. Merit Systems Protection Board Survey, *supra* note 3, at 80 (7% quit or transfer); B. Gutek, *Sex and the Workplace* 54 (1985) (14.2% quit or transfer because of sexual harassment).

[65] Hemming, *supra* note 11, at 69.

[66] *Id.*

[67] The magnitude of the problem is indicated by the Merit Systems Protection Board Survey which found that the cost to the federal government caused by employee turnover due to sexual harassment of women was, by conservative estimates, $22.5 million over a two-year period. Merit Systems Protection Board Survey, *supra* note 3, at 77.

Sexual harassment that creates a hostile work environment not only adversely affects the actual victim to whom the sexually harassing conduct or verbal abuse is directed, it also has a detrimental effect on the victim's co-workers.[68] Women who are not the actual object of the sexual harassment feel demeaned when they witness other women being harassed. Most men also find it offensive and embarassing to see their own working mothers, sisters, daughters or friends subjected to derogatory verbal abuse or intimidating sexual contact.[69]

The stark statistical evidence confirms that sexual harassment interferes with women's work performance even if the harassment does not affect a tangible job benefit. In a "pure" hostile work environment case, a plaintiff will have received all the employment-related benefits due her. If this Court concludes that she must suffer some tangible loss, then a woman is required to submit to psychological debasement until the harassment is so severe that she is driven from the workplace by means of an actual or constructive discharge. Congress could not have intended this result, which would permit an employer to sexually harass an employee and destroy her psychological stability, but avoid liability by continuing to give her the tangible employment-related benefits to which she is entitled. Such a requirement would raise, rather than lower, the obstacles to women seeking equal employment opportunities.

C. *Sexual Harassment is Conduct That Discriminates "Because of Sex" in Violation of Section 703(a)(1)*

Under a disparate treatment theory, it is not enough that a plaintiff show she suffered disparate treatment due to sexual harassment. She must also show that "the [employer] *in-*

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[68] The EEOC Guidelines implicitly recognize this fact where they state disjunctively that sexual harassment is unlawful *either* when it interferes with an individual's performance *or* when it creates a hostile work environment. 29 C.F.R. § 1604.11(a)(3) (1984) (emphasis supplied).

[69] Any doubt as to whether indirect contact with sexual harassment adversely affects the bystanders of the victim is dispelled by the Merit Systems Protection Board Survey. The Survey showed that the loss of productivity in the harassment victim's workgroup ($76.9 million) was *higher* than the loss of productivity attributable to the victims themselves ($72.1 million). Merit Systems Protection Board Survey, *supra* note 3, at 77-78.

tentionally discriminated against [her] . . . ." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1980) (emphasis supplied). *Accord United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). The inquiry is whether the plaintiff has been treated differently than others *because of* her sex, or other protected classification. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Thus, in order to show that sexual harassment violates Section 703(a)(1), a plaintiff must show that she was harassed because of her gender and that the harasser intended to discriminate against her.

Sexual harassment is obviously conduct engaged in "because of" the victim's sex since, were it not for the woman's gender, she would not be subjected to the unwanted sexual attentions. *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984). This statutory requirement can be satisfied when a man harasses a woman, a woman harasses a man[70] or a homosexual harasses a person of the same sex, since the victim is being treated differently than members of the opposite sex solely because of his or her sex.[71] *Bundy v. Jackson*, 641 F.2d at 942 n.7. As one commentator explained: "Sexual harassment is discrimination on the basis of sex where the advances are heterosexual or homosexual, provided the advances are directed at only one sex." Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 Mich. L. Rev. 1007, 1020-21 n.99 (1978).[72]

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[70] *Cf. Calcote v. Texas Educational Foundation, Inc.*, 578 F.2d 95 (5th Cir. 1978) (whites sued for racial discrimination directed towards them by non-whites); *Lucero v. Beth Israel Hosp. and Geriatric Center*, 479 F. Supp. 452 (D. Colo. 1979) (same).

[71] Title VII does not protect individuals from discrimination directed against them because of their sexual preferences. *See generally* B. Schlei and P. Grossman, *Employment Discrimination Law* 430 (1983) and cases cited.

[72] It is true that Title VII may not outlaw sexual harassment by a bisexual against members of both sexes since there is no "disparate" treatment on the basis of sex in this situation. *Bundy v. Jackson*, 641 F.2d 934, 942 n.7; *Barnes v. Costle*, 561 F.2d 983, 990 n.55. Although this result is perhaps as "bizarre" as Justice Bork maintains, amici respectfully contend that the fact that Title VII may not prohibit the most unusual form of sexual harassment is no reason to find that Title VII does not prohibit any form of sexual harassment at all. *See Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc).

Sexually harassing conduct is also conduct which is *intentionally* discriminatory. Discriminatory intent in a sexual harassment case may be inferred from the nature of the sexually harassing conduct. Otherwise stated, when a plaintiff establishes that sexual harassment has occurred, she has produced direct evidence of discriminatory animus.[73]

As the Eleventh Circuit has recognized, "the case of sexual harassment that creates an offensive environment does not present a factual question of intentional discrimination which is at all elusive . . . it should be clear that sexual harassment is discrimination based on sex." *Henson*, 682 F.2d at 905 n.11. The Fourth Circuit has pointed out that, unlike the usual disparate treatment claim, the improper motive is self-evident in sexual harassment cases. *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983). In fact, some courts have found that the existence of sexual harassment indicates a discriminatory animus sufficient to satisfy the intent requirement in a traditional, disparate treatment sex discrimination claim. *E.g., Morgan v. Hertz Corp.*, 542 F. Supp. 123, 125 (W.D. Tenn. 1981), *aff'd sub nom. Sones-Morgan v. Hertz Corp.*, 725 F.2d 1070 (6th Cir. 1984) (court rejected as pretextual defendant's proferred reasons for not promoting the plaintiffs because it found that the

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[73] Thus, contrary to the Bank's assertions, the courts need not employ the analysis set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That analysis is necessary only to rebut nondiscriminatory reasons offered by the employer for the disparate treatment. While it is conceivable that an employer could offer nondiscriminatory reasons for the denial of a tangible job benefit, amici have difficulty imagining that there could be any nondiscriminatory impetus behind the creation of a hostile or offensive work environment. Furthermore, even assuming *arguendo* that an employer satisfactorily proves that a tangible job benefit was denied a plaintiff for nondiscriminatory reasons, if the plaintiff has established a sufficient quantum of sexual harassment, *see* discussion *infra* at p. 26, she is likely to succeed in proving a hostile work environment claim independently of, and despite her failure to prove, the tangible job benefits claim.

defendant had "vocalized his anti-woman animus" by directing sexually suggestive and indecent comments to the plaintiff). *See also Dacus v. Southern College of Optometry*, 476 F. Supp. 639, 640-41 (W.D. Tenn. 1976), *aff'd*, 657 F.2d 81 (6th Cir. 1981); *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894 (D.N.J. 1978), *vacated in part on other grounds*, 473 F. Supp. 786 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

Indeed, in analogous areas, the courts do not even bother to discuss whether racist epithets or ethnic slurs display discriminatory animus. *See Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977). *See also Calcote v. Texas Educational Foundation, Inc.*, 578 F.2d 95, 98 (5th Cir. 1978). Presumably this is because the discriminatory animus appears from the content and frequency[74] of the remarks themselves.

A sexually discriminatory animus can be evidenced by a single act of sexual harassment or by a pattern of lesser, repeated sexually harassing remarks or conduct. Amici strongly contend that even a single, isolated instance of harassment violates Title VII if the incident is severe or if the incident is explicitly tied to the grant or denial of a tangible job benefit. For example, if a supervisor predicates a woman's promotion on her having sexual intercourse with him, amici assert that this single act of sexual harassment is sex discrimination within the meaning of Title VII. On the other hand, when the employment-related effects of the harassment are less obvious, and when the harassment itself is less patently coercive, a greater frequency of harassment may be required. *Compare Walter v. KFGO Radio*, 518 F. Supp. 1309, 1316 (D.N.D. 1981) (occasional instances of allegedly harassing conduct insufficient to show hostile work environment) *with Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) ("[t]he FAA work-

[74] In *Cariddi*, the lower court's judgment for the defendant was sustained because "the derogatory ethnic comments made by Cariddi's superior were part of casual conversation and did not rise to the level necessary to constitute a violation of Title VII." *Cariddi*, 568 F.2d at 88.

place was pervaded with sexual slur, insult and innuendo. . . ."). One commentator has suggested:

> In order to establish a prima facie case of abusive environment sexual harassment, a plaintiff should have to prove that more than one isolated incident of sexually offensive conduct has occurred. Unlike *quid pro quo* sexual harassment, which may involve only a single incident (for example, firing or demotion for refusal to engage in sexual activity), abusive environments are characterized by multiple, though perhaps individually nonactionable, incidents of offensive conduct. The greater injury results not simply from a single offensive act or comment, but from the risk of repeated exposure to such behavior. Thus, a finding that offensive conduct is a condition of the workplace should require a showing that such conduct occurs with some frequency. Nevertheless, because the effect of only one or a few physical advances or threats may be as devastating as that of repeated sexual propositions and innuendoes, the threshold for determining whether there has been repeated exposure should vary inversely with the offensiveness of the incidents.

Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1458-59 (1984) (footnote omitted). *See also* Comment, *Employment Discrimination—Sexual Harassment and Title VII*, 51 N.Y.U. L. Rev. 148, 164 n.76 (1976).[75]

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In conclusion, sexual harassment is an unlawful condition of employment when it interferes with an individual's work performance or a group's work performance by creating a work environment that is abusive, hostile or offensive to women. Furthermore, sexual harassment is unlawful conduct within the

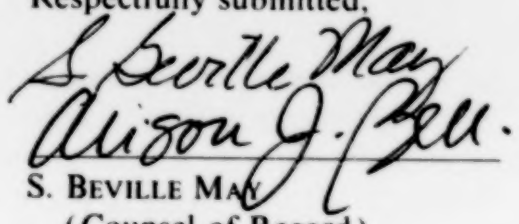
[75] Amici do *not* assert that an occasional sexist remark or sexual slur will result in Title VII liability. Common sense dictates (and the courts have found) that trivial and isolated instances of sexually harassing words or conduct are not actionable under Title VII. As one court explained: "Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive." *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984). *Accord Henson v. City of Dundee*, 682 F.2d 897, 904 n.8 (D.C. Cir. 1982); *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984).

meaning of Section 703(a)(1) since it is conduct directed against the victim because of her gender and it is conduct which, by its very nature, displays a discriminatory animus. The adverse effects on employees in the workplace under these circumstances are insidious and considerable. We urge this Court to recognize that sexual harassment that creates a "hostile work environment" poses obstacles every bit as insuperable to women in the workplace as do the classic forms of economic-sexual coercion that have long been held to violate Title VII.

CONCLUSION

For the reasons stated, amici respectfully ask that this Court affirm the decision of the court of appeals below and remand this case to the district court for further proceedings.

Respectfully submitted,



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Dated: February 7, 1986

APPENDIX

Brief Description of Selected Empirical Studies Cited in the Brief

Epstein, *The New Women and the Old Establishment: Wall Street Lawyers in the 1970's,* 7 Sociology of Work & Occupations 291 (1980)

The author conducted two waves of interviews of a small sample of women lawyers in New York City randomly chosen from Martindale-Hubbell Law Directory as a follow-up to an earlier study in the 1960's concerning women's entry into major Wall Street law firms.

Gruber & Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers,* 9 Work and Occupations 271 (1982)

The author conducted interviews lasting approximately 1.5 hours of a small sample of unskilled blue collar women workers in a Dearborn, Michigan automobile plant where the plantwide proportion of women was 10% of a total workforce of 5200. The study sought to determine the frequency and severity of sexual harassment in this sample and the attitudinal and behavioral responses to sexual harassment.

Gutek, B., *Sex and the Workplace* (1985)

This book reports the author's investigations of the effects of sex at work on individuals and organizations, based on findings from several studies but primarily on a random telephone survey of working adults in Los Angeles County in 1981, which yielded 1232 interviews (827 women, 405 men).

Gutek, Nakamura, Gahart, Handschumacher & Russell, *Sexuality and the Workplace,* 1 Basic & Applied Soc. Psychology 255 (1980)

This study examines attitudes of men and women toward various aspects of social-sexual behaviors at work, based on a random sample telephone survey of working adults in Los Angeles County in 1978 which yielded 399 interviews (55% women) of about 30 minutes each.

Hemming, *Women in a Man's World: Sexual Harassment*, 38 Hum. Relations 67 (1985)

This article reviews and synthesizes several focused studies into a broad evaluation of the psychodynamics of and group responses to sexual harassment. Sex role behavior in an inimical work atmosphere is also discussed.

Jensen & Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. of Soc. Issues 121 (1982)

This study examines how two pairs of groups, victims and nonvictims, and men and women, assign blame for incidents of sexual harassment. The study is based on the 1981 surveys described above in Gutek, B., *Sex and the Workplace* (1985).

Lembright & Riemer, *Women Truckers' Problems and the Impact of Sponsorship*, 9 Work & Occupations 457 (1982)

This study examines the impact of male sponsorship on women pursuing a nontraditional occupation based on responses to an open-ended questionnaire mailed to women long-distance truckers throughout the country.

Maypole & Skaine, *Sexual Harassment of Blue Collar Workers*, 9 J. Sociology and Soc. Welfare 682 (1982)

This study examined attitudes to various forms of sexual harassment in a male dominated blue-collar workforce (1,561 men and 243 women) based on 324 responses (164 men and 160 women) to a questionnaire mailed to a random sample of the workforce.

Maypole & Skaine, *Sexual Harassment in the Workplace*, 1983 Social Work 385

This article is a selective review of the literature on sexual harassment which yields an overall picture of the extent, effects and social and historical context of sexual harassment. The article also discusses possible forms of recourse for victims.

Office of Merit Systems Review and Studies, U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace—Is It a Problem?* (1981)

This study, conducted at the request of the Subcommittee on Investigations of the Committee on Post Office and Civil Service of the United States House of Representatives, surveyed over 23,000 federal employees who were asked to base their answers on their work experiences in over sixteen federal agencies between May 1978 and May 1980. The Office of Merit Systems employed a disproportionately stratified random sample in the Survey and the questionnaires were mailed to respondents. Reminder post cards and follow up questionnaries were also sent to respondents. An unusually high response rate of 85% was obtained. All final results in the Survey are expressed in "weighted" terms to properly reflect the categories' actual size in the federal workplace. The Survey attempts to define sexual harassment, to determine its extent in the federal workplace, its nature (both by severity and by particular form of harassing conduct), its effect on workers, (broken down into a variety of sub-categories of workers) and its employment implications for victims, *inter alia*. The Survey is also a valuable source of data showing the economic impact of harassment on both the employer and the employee.

Renick, *Sexual Harassment at Work: Why It Happens, What to Do About It*, 59 Personnel J. 659, 660 (1980)

This article reviews the literature on sexual harassment, sets forth the problems caused by sexual harassment, and proposes causes of harassment. The article also discusses, from a layperson's perspective, why harassment is sex discrimination.

Safran, *What Men Do To Women on the Job: A Shocking Look at Sexual Harassment*, Redbook, November 1976, at 149

The Redbook Survey, the first survey to reveal the extent of sexual harassment to public view, was in the form of a questionnaire published in Redbook Magazine in January 1976. Respondents who returned the questionnaires (9000 Redbook readers) are a "self-selected group," which is considered statistically less reliable than a random sample group.

Nevertheless, the Redbook Survey is noteworthy from a historical perspective and its basic conclusions, if not its statistical results, have been confirmed by subsequent methodologically reliable studies.

Tangri, Burt and Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. Soc. Issues 33 (1982)

This study examines three proposed models of sexual harassment using data from the Merit Systems Protection Board Survey. The first model proposes that sexually-oriented behavior in the workplace is a normal consequence of male-female interaction with only idiosyncratic exceptions. The second model proposes that harassers have more power, status or security within an organization than victims and harassment is thus a way to intimidate and control subordinates. The final model proposes that harassment stems from a larger social context, one where male dominance is maintained by cultural patterns of sex role behavior. Data tend to support the latter two theories and reject the first theory.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
Interest of Amici Curiae	1
Summary of Argument	3
Argument	4
I. Congress Intended All Forms of Employment-Related Discrimination, Including Sexual Harassment, To Be Broadly and Equally Prohibited Under Title VII	5
A. Congress Intended Its Prohibitions Against Race and Sex Discrimination To Be Interpreted Identically	5
B. Congress Intended That Title VII's Prohibitions Be Construed Broadly To Prohibit All Manifestations of Discrimination, Including Sex Discrimination	8
C. Congress Intended Title VII's Broad Prohibitions Against Discrimination To Encompass Harassing Work Environments	10
1. *Rogers v. EEOC*	11
2. The EEOC's View	13
II. Congress Intended That Employers Be Held To The Same Standard of Liability For The Sexually Harassing Conduct Of Their Supervisory Employees As Is Applied In All Other Title VII Contexts	16
III. The EEOC's Guidelines On Sexual Harassment —Which Make The Employer Liable For All Acts Of Its Agents And Supervisory Employees —Are Entitled To Great Deference	20
Conclusion	24

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 10
Allegheny Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529 (3d Cir. 1962) 17
Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972) 17
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 13
Calcote v. Texas Educational Foundation, Inc., 578 F.2d 95 (5th Cir. 1978) 16
Cannon v. University of Chicago, 441 U.S. 677 (1979) 11
Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977) 12
City of Los Angeles, Department of Water v. Manhart, 435 U.S. 702 (1978) 10
Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) 17
Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) 14
Ferguson v. E.I. Du Pont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983) 23
Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), *cert. denied sub nom. Banta v. United States*, 434 U.S. 819 (1977) 13
Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) 17
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 21
Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 7
Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976) 12
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 21
Hayden v. Atlanta Newspapers, 534 F. Supp. 1166 (N.D. Ga. 1982) 23
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 13

TABLE OF AUTHORITIES—Continued

Page

James v. O'Bannon, 715 F.2d 794 (3d Cir. 1983), *cert. denied*, —— U.S. ——, 105 S.Ct. 1746 (1985) 11
Lucero v. Beth Israel Hospital & Geriatric Center, 479 F. Supp. 452 (D. Colo. 1979) 16
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 16
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 20
Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) 20
Ostopowicz v. Johnson Bronze Co., 369 F. Supp. 522 (W.D. Pa. 1973), *modified*, 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) 17
Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981) 19
Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) 11, 12
Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) 16
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 7
Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) 17
Tcherepnin v. Knight, 389 U.S. 332 (1967) 18
Texas Aluminum Corp. v. NLRB, 435 F.2d 917 (5th Cir. 1970) 17
Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971) 17
United States v. City of Buffalo, 452 F. Supp. 612 (W.D.N.Y. 1978), *modified on other grounds*, 633 F.2d 643 (2d Cir. 1979) 13
United States v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976) 17
Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985) 4, 18, 13

TABLE OF AUTHORITIES—Continued

Page

Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969) 14
Young v. Southwestern Savings & Loan Association, 509 F.2d 140 (5th Cir. 1975) 16

Statutes and Guidelines:

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*

42 U.S.C. 2000e(a) 7
42 U.S.C. 2000e(b) 16, 18
42 U.S.C. 2000e-2(a)(1) 5
42 U.S.C. 2000e-2(e) 6
42 U.S.C. 2000e-4 20
42 U.S.C. 2000e-5 20
42 U.S.C. 2000e-5(a) 6
42 U.S.C. 2000e-5(f) 7

National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

29 U.S.C. § 152(2) 17

Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11 *et seq.* (1985)

Section 1604.11(a)(3) 21
Section 1604.11(c) 21

Legislative History:

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 9
S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 7, 8, 13
H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) 7, 13
118 Cong. Rec. 7,166 (1972) 10, 11
118 Cong. Rec. 4,940 (1972) 10
110 Cong. Rec. 13,080 (1964) 9
110 Cong. Rec. 7,212 (1964) 18
110 Cong. Rec. 7,213 (1964) 9
110 Cong. Rec. 7,215 (1964) 8
110 Cong. Rec. 7,218 (1964) 9
110 Cong. Rec. 2,577 (1964) 6
110 Cong. Rec. 2,579-84 (1964) 6

TABLE OF AUTHORITIES—Continued

Miscellaneous:

Page

Sexual Harassment in the Federal Government, Hearings Before the House Subcommittee on Investigations of the Committee on Post Office and Civil Service (Part I), 96th Cong., 1st Sess. (1979) 3, 23
Sexual Harassment in the Federal Government, Hearings Before the House Subcommittee on Investigations of the Committee on Post Office and Civil Service (Part II), 96th Cong., 2d Sess. (1980) 3, 22, 23
45 Fed. Reg. 25,024 (April 11, 1980) 20, 23
45 Fed. Reg. 74,676 (Nov. 10, 1980) 20, 23
Report of the Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It A Problem? (March 1981) 3
A. Larson & L. Larson, 1 *Employment Discrimination* § 41.65 (1985) 24
Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harrassment Under Title VII*, 61 B.U.L. Rev. 535 (1981) 24

EEOC Decisions:

Dec. 81-18, 27 Fair Empl. Prac. Cases (BNA) 1793 (1981) 23
Dec. 81-17, 27 Fair Empl. Prac. Cases (BNA) 1791 (1981) 23
Dec. 72-1561, 4 Fair Empl. Prac. Cases (BNA) 852 (1972) 15
Dec. 72-0779, 4 Fair Empl. Prac. Cases (BNA) 317 (1971) 15
Dec. 72-0679, 4 Fair Empl. Prac. Cases (BNA) 441 (1971) 15
Dec. 71-2598, 4 Fair Empl. Prac. Cases (BNA) 21 (1971) 15
Dec. 71-2042, 3 Fair Empl. Prac Cases (BNA) 1002 (1971) 14

TABLE OF CONTENTS—Continued

	Page
Dec. 71-1545, 3 Fair Empl. Prac. Cases (BNA) 761 (1970)	22
Dec. 71-1442, 3 Fair Empl. Prac. Cases (BNA) 493 (1971)	14
Dec. 71-909, 3 Fair Empl. Prac. Cases (BNA) 269 (1970)	14, 22
Dec. 70683, 2 Fair Empl. Prac. Cases (BNA) 606 (1970)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1979

MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The following members of the 99th Congress of the United States respectfully submit this brief, with the consent of all parties,[1] as amici curiae in support of respondent Mechelle Vinson: Senator Paul Simon (D-IL) (Labor and Human Resources Committee); Rep. Augustus F. Hawkins (D-CA) (Chairman, Education and Labor Committee); Rep. Hamilton Fish, Jr. (R-NY) (Ranking Minority Member, Judiciary Committee); Rep.

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[1] Letters indicating consent have been filed with the Clerk.

Lane Evans (D-IL); Rep. Charles A. Hayes (D-IL) (Education and Labor Committee); Rep. Mike Synar (D-OK) (Judiciary Committee); Rep. Patricia Schroeder (D-CO) (Judiciary Committee); Rep. Barbara Boxer (D-CA); Rep. Robert J. Mrazek (D-NY); Rep. Olympia J. Snowe (R-ME); Rep. Sala Burton (D-CA); Rep. Claudine Schneider (R-RI); Rep. Don Edwards (D-CA) (Chairman, Civil and Constitutional Rights Subcommittee of the Judiciary Committee); Rep. Mary Rose Oakar (D-OH); Rep. Jim Moody (D-WI); Rep. Barbara A. Mikulski (D-MD); Rep. Geo. W. Crockett, Jr. (D-MI) (Judiciary Committee); Rep. John R. McKernan, Jr. (R-ME) (Education and Labor Committee); Rep. Howard L. Berman (D-CA) (Judiciary Committee); Rep. Ronald V. Dellums (D-CA); Rep. Mickey Leland (D-TX); Rep. Bruce A. Morrison (D-CT) (Judiciary Committee); Rep. William L. (Bill) Clay (D-MO) (Chairman, Labor-Management Relations Subcommittee of the Education and Labor Committee); Rep. Barbara B. Kennelly (D-CT); Rep. Julian C. Dixon (D-CA); Rep. Cardiss Collins (D-IL); Rep. Nancy L. Johnson (R-CT); Rep. Bill Green (R-NY); and Rep. Bob Edgar (D-PA).

As members of the legislative branch that enacted Title VII of the Civil Rights Act, amici curiae are vitally interested in this Court's interpretation of that statute. Particularly where, as here, legislative intent is dispositive, amici seek to ensure that Congress' commitment to the fair and equal treatment of all employees—regardless of race, color, national origin, religion, or sex—is fully and accurately presented for the Court's consideration.

Amici curiae are especially concerned about the pervasive problem of sexual harassment in the workplace and the accompanying psychological, emotional and economic harms caused by that invidious form of discrimination. From the outset, Congress consistently has made clear that sexual harassment in the workplace constitutes a

discriminatory employment practice forbidden by Title VII, and that sexual harassment is subject to the same legal standards as are applied in instances involving discrimination because of race, color, national origin, and religion. More recently, Congress has explored and attempted to ameliorate sexual harassment in the workplace. It has conducted extensive hearings on the topic [2] and commissioned the Merit Systems Protection Board to undertake the most comprehensive study of the problem to date.[3]

The clear intent of Congress in enacting and expanding Title VII will be contradicted if this Court adopts the restrictive construction urged by petitioner and, in part, by government amici curiae here.

SUMMARY OF ARGUMENT

Sexual harassment is a form of sex discrimination proscribed by Title VII. Congress has affirmed that the prohibitions against sex discrimination contained in Title VII are identical to the prohibitions against race discrimination codified in that statute. Congress explicitly has approved judicial and administrative decisions declaring employment-based racial harassment unlawful under the Civil Rights Act of 1964. As a result, courts uniformly have held Title VII to prohibit employment-based sexual harassment. Nothing in law or logic supports any other conclusion.

Congress also has mandated strict employer liability for the sexually harassing conduct of an employer's agents. Title VII's definition section equates "employer"

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[2] Sexual Harassment in the Federal Government, Hearings Before the House Subcommittee on Investigations of the Committee on Post Office and Civil Service (Part I), 96th Cong., 1st Sess. (1979); *id.* (Part II), 96th Cong., 2d Sess. (1980).

[3] Report of the Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It A Problem? (March 1981).

and "agent." Congress explicitly has approved judicial and administrative decisions applying strict employer liability in numerous discrimination contexts. The Equal Employment Opportunity Commission concludes in comprehensive sexual harassment guidelines that Title VII mandates strict employer liability. Any other conclusion would frustrate the broad remedial purposes underlying the anti-discrimination statutes.

ARGUMENT

This brief discusses two of the questions certified by the Court for review. First, do allegations that a male supervisor's persistent and unwelcome sexual advances to a female subordinate created a sexually harassing work environment state a claim under Title VII of the Civil Rights Act of 1964? Second, is the employer responsible under Title VII for its supervisor's harassing conduct?

The Court of Appeals for the District of Columbia answered both questions in the affirmative. *Vinson v. Taylor*, 753 F.2d 141, 144, 147 (D.C. Cir. 1985). It did so after careful consideration of the language and legislative history of Title VII, as well as of prior judicial and administrative decisions. 753 F.2d at 147-48. Petitioner urges the Court to reverse, arguing that Title VII does not protect women employees from a supervisor's sexually harassing conduct unless that conduct involves an actual or threatened loss of tangible job benefits (Pet. Br. 30), and that an employer cannot be held responsible for a supervisor's harassing conduct absent notice and an opportunity to correct the situation (Pet. Br. 20). The United States and the Equal Employment Opportunity Commission ("EEOC"), as amici curiae, concede that a sexually harassing work environment violates Title VII (U.S. Br. 15), but urge the Court to hold that an employer is responsible for the sexually harassing conduct of its supervisors only if it knew or had reason to know about the conduct (U.S. Br. 26).

We submit that the decision of the Court of Appeals was in accord with the langauge and legislative history of Title VII. Congress intended Title VII's prohibitions to be construed broadly to eliminate all manifestations of sex-based employment discrimination. The statute makes no distinction among employment discrimination based upon race, color, religion, national origin, or sex. Title VII was intended to protect women from sexual harassment at work just as it was intended to protect blacks and other minorities from racial or religious harassment. Employers are equally liable for a sexually harassing workplace as they are for all other instances of discrimination because of race, color, religion, or national origin.

I. CONGRESS INTENDED ALL FORMS OF EMPLOYMENT-RELATED DISCRIMINATION, INCLUDING SEXUAL HARASSMENT, TO BE BROADLY AND EQUALLY PROHIBITED UNDER TITLE VII.

A. Congress Intended Its Prohibitions Against Race and Sex Discrimination To Be Interpreted Identically.

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[4] The plain language of the statute makes no distinction among discrimination because of race, color, religion, national origin, religion, or sex. Likewise, nothing in the structure of Title VII suggests that Congress intended its prohibitions against sex discrimination, or any aspect thereof, to be treated differently from the other forms of discrimination proscribed by that statute.[5]

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[4] 42 U.S.C. § 2000e-2(a)(1) (1982).

[5] Title VII's enforcement scheme does not distinguish between sex and other forms of discrimination, but applies to all employers

The legislative history of Title VII confirms that Congress intended its prohibitions against sex discrimination to be interpreted in precisely the same manner as the other enumerated prohibitions. The prohibitions against employment discrimination based on sex were added to Title VII as a result of an amendment offered by Representative Smith on the floor of the House of Representatives.[6] The principal argument in opposition to that amendment was that "sex discrimination" was sufficiently different from other types of discrimination as to demand separate legislative treatment.[7] By accepting the Smith amendment, Congress squarely rejected those contentions. Instead, Congress agreed with the sentiments expressed by Representative St. George, among others: "The addition of that little, terrifying word 's-e-x' will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right." [8]

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that engage "in *any* unlawful employment practice." 42 U.S.C. § 2000e-5(a) (1982) (emphasis added). Sex discrimination, however, like all forms of prohibited discrimination except race discrimination, is subject to the narrow "bona fide occupational qualification" exception. *Id.* § 2000e-2(e).

[6] 110 Cong. Rec. 2,579-84 (1964), *reprinted in* U.S. Equal Employment Opportunity Commission, 1 Legislative History of Titles VIII and IX of the Civil Rights Act of 1964, at 3,213-28 (undated) [hereinafter referred to as "*Leg. Hist.*"].

[7] *See* 110 Cong. Rec. 2,577 (1964), *reprinted in Leg. Hist.* at 3,214 (Statement of Rep. Celler quoting letter from U.S. Department of Labor) ("But discrimination based on sex, the Commission believes, involves problems sufficiently different from discrimination based on other factors listed to make separate treatment preferable."). *See also id.* at 2,584, *reprinted in Leg. Hist.* at 3,227 (Statement of Rep. Green) ("Because of biological differences between men and women, there are different problems which will arise in regard to employment . . . . These should be taken into consideration before any vote is made in favor of the amendment . . . .").

[8] 110 Cong. Rec. 2,581 (1964), *reprinted in Leg. Hist.* at 3,221.

Revisiting Title VII in 1972,[9] Congress reaffirmed that discrimination based on sex was to be treated no differently than discrimination on account of any other prohibited characteristic.[10] The Report of the House Education and Labor Committee makes this plain:

> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.[11]

The Report of the Senate Committee on Labor and Public Welfare is equally emphatic:

> While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is

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[9] Congress amended Title VII when it enacted the Equal Employment Opportunity Act of 1972. The primary purpose of the 1972 amendments was to remedy what Congress perceived to be "a major flaw in the operation of Title VII"—the absence of meaningful administrative enforcement powers. S. Rep. No. 415, 92d Cong., 1st Sess. 4 (1971). *See also* H.R. Rep. No. 238, 92d Cong., 1st Sess. 2 (1971), *reprinted in* 1971 U.S. Code Cong. & Ad. News 2,137, 2,138. To this end, Congress empowered the EEOC to issue cease and desist orders and to bring suit in federal court. *See* 42 U.S.C. § 2000e-5(f) (1982). In addition, Congress expanded the scope of Title VII's substantive protections to embrace local, state and federal employees. *Id.* § 2000e(a).

[10] The 92d Congress' view of Title VII's prohibition against sex discrimination is entitled to great weight. *See, e.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962) (" 'Subsequent legislation which declares the intent of an earlier law' . . . 'is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction.' ") (quoting *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90 (1958)); *see also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

[11] H.R. Rep. No. 238, 92d Cong., 1st Sess. 5 (1971), *reprinted in* 1971 U.S. Code Cong. & Ad. News 2,137, 2,141.

> no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct.[12]

The Senate Committee Report goes on to note that "recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics." [13]

The 1964 and 1972 legislative histories thus confirm what the language of Title VII makes plain—in all respects, Congress' prohibitions against sex discrimination are to be interpreted in the same manner as its prohibitions against discrimination on account of race, color, national origin, and religion.

B. Congress Intended That Title VII's Prohibitions Be Construed Broadly To Prohibit All Manifestations of Discrimination, Including Sex Discrimination.

Contrary to petitioner's assertion (Pet. Br. 20), Congress did not intend to restrict Title VII's scope to discriminatory acts involving hiring, firing, promotions, or other purely economic aspects of employment. Congress chose to encompass much more than that. Senator Clark, one of the floor managers of the Civil Rights Act of 1964, described the statute's scope this way:

> It deals with discrimination in employment, and would make it an unlawful employment practice . . . to discriminate on account of race, color, religion, sex, or national origin, *in connection with employment* . . . .[14]

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[12] S. Rep. No. 415, 92d Cong., 1st Sess. 7 (1971).

[13] *See supra* note 12.

[14] 110 Cong. Rec. 7,215 (1964), *reprinted in Leg. Hist.* at 3,009 (emphasis added). During a debate two months later, Senator Clark reiterated that Title VII says to employers: "'In your activity as an employer, . . . you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin, or sex.'" *Id.* at 13,080, *reprinted in Leg. Hist.* at 3,092.

Later, in an interpretive memorandum, Senators Clark and Case explained the term "discrimination" as follows:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. *To discriminate is to make a distinction, to make a difference in treatment or favor*, and those distinctions or differences in treatment or favor which are prohibited by Section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin.[15]

This Court previously has emphasized the breadth of Congress' mandate to eliminate sex discrimination:

> In forbidding employers to discriminate against individuals because of their sex, *Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.*

[15] 110 Cong. Rec. 7,213 (1964), *reprinted in Leg. Hist.* at 3,042-43 (emphasis added). In another memorandum, Senator Clark explained that: "To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if these are based on any of the five forbidden criteria (race, color, religion, sex, or national origin)." *Id.* at 7,218, *reprinted in Leg. Hist.* at 3,015.

Title VII's opponents also were cognizant of the broad scope of the term "discrimination." Representatives Poff and Cramer complained of the vagueness of many of Title VII's terms and concluded that "it is not unrealistic to predict that the interpretations the courts would make would be of the broadest possible scope." H.R. Rep. No. 914, 88th Cong., 1st Sess. 113 (1963) (Sep. Minority Views of Reps. Poff and Cramer), *reprinted in Leg. Hist.* at 2,112. The House Minority Report made the same observation. "The depth, the revolutionary meaning of this act, is almost beyond description . . . . It has open-ended provisions that give it whatever depth and intensity one desires to read into it." *Id.* at 70 (Minority Report), *reprinted in Leg. Hist.* at 2,069.

> Section 703 (a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.[16]

Petitioner's arguments that Title VII's scope somehow is limited to the economic aspects of employment plainly is wrong.

C. Congress Intended Title VII's Broad Prohibitions Against Discrimination To Encompass Harassing Work Environments.

Congress in 1972 endorsed the views of the courts and the Equal Employment Opportunity Commission that Title VII affords protection to workers from racially and ethnically hostile work environments. Combined with its clear mandate that all forms of invidious discrimination be treated equally, Congress necessarily intended Title VII to protect against sexually harassing work environments.

Congress' endorsement of the prevailing judicial view is set out in the William-Javits memorandum analyzing the 1972 amendment to Title VII on a section-by-section basis.[17] The memorandum states:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.[18]

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[16] *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971)) (emphasis added).

[17] The Court previously has relied on this memorandum as indicative of Congress' intent. *See Albemarle Paper Co. v. Moody*, 442 U.S. 405, 420-21 (1975).

[18] 118 Cong. Rec. 7,166 (1972) (emphasis added). The memorandum was introduced on February 22, 1972 (118 Cong. Rec. 4,940) and again on March 6, 1972 (118 Cong. Rec. 7,166), just before the Senate approved the conference version of the 1972 amendments.

Congress regularly reviews administrative or judicial interpretations of its statute and these interpretations are considered and presumed adopted if the statute subsequently is revised. *See, e.g., James v. O'Bannon*, 715 F.2d 794, 804 (3d Cir. 1983), *cert. denied*, —— U.S. ——, 105 S. Ct. 1746 (1985) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)). *See also Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979). It is unnecessary to resort to this presumption where, as here, Congress expressly ratified the courts' prevailing constructions of Title VII.

1. Rogers v. EEOC.

A significant part of the "present case law" endorsed by Congress in 1972 was *Rogers v. Equal Employment Opportunity Commission*.[19] In *Rogers*, the United States Court of Appeals for the Fifth Circuit held that the EEOC was authorized by Title VII to investigate an allegation by an Hispanic employee that her employer provided discriminatory services to its Hispanic clientele.[20] The court concluded that an allegation that an employer created an ethnically discriminatory work environment for its employees stated a claim for relief under Title VII.[21]

The Fifth Circuit reached its conclusion after examining the language and purpose of Title VII. The court was "acutely conscious" that Congress intended Title VII to be construed liberally to prohibit all forms of employment-related discrimination:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discrim-

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[19] 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

[20] 454 F.2d at 236-37. The allegation in *Rogers* stated that the employer "has discriminated against me because of my national origin Spanish surnamed American by . . . segregating the patients." 454 F.2d at 236. Significantly, the employee did not allege that her employer had deprived her of any tangible economic benefit.

[21] 454 F.2d at 238.

> inatory practices, nor to elucidate in extenso the parameter[s] of such nefarious activities. Rather, it pursued the path of wisdom by being unconstructive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.[22]

With that broad mandate in mind, the court reasoned that an employee's protections under Title VII extended beyond the tangible, economic aspects of employment:

> [The] employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and . . . the phase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.[23]

Petitioner's criticism of *Rogers* as "no more than a personalized philosophy of Title VII" (Pet. Br. 34) is wrong. Besides failing to demonstrate how *Rogers* even conceivably disserves Congress' intent, petitioner ignores lower courts' repeated reliance on *Rogers* for the proposition that Title VII prohibits discriminatory work environments, including those created by a supervisor's harassing conduct. Thus, in *Cariddi v. Kansas City Chiefs Football Club*,[24] the Eighth Circuit cited *Rogers* for conclusion "that [ethnically] derogatory comments could be so excessive and opprobrious as to constitute an unlawful employment practice under Title VII." Similarly, in *Gray v. Greyhound Lines, East*,[25] the District of Columbia Circuit relied upon *Rogers* in holding that Title VII outlaws ra-

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[22] 454 F.2d at 238.

[23] 454 F.2d at 238.

[24] 568 F.2d 87, 88 (8th Cir. 1977).

[25] 545 F.2d 169, 176 (D.C. Cir. 1976).

cially discriminatory hiring practices that create a psychologically oppressive work environment for minority employees. *Accord United States v. City of Buffalo*[26] (quoting *Rogers*, court concluded that Title VII prohibits racial slurs and other acts of harassment that create "a work environment heavily charged with discrimination").[27] Contrary to petitioner's claims, *Rogers* is much more than a purely personalized philosophy, and Congress' endorsement of *Rogers* reflects its intent that Title VII prohibits discriminatory work environments.

2. *The EEOC's View.*

Congress also endorsed the EEOC's contemporaneous constructions of Title VII prior to enactment of the 1972 amendments. The Senate Committee Report commended the Commission for its "heroic attempt to reduce . . . [all] incidence[s] of employment discrimination."[28] The House Committee lauded the EEOC's efforts to combat discrimination, commenting favorably that the Commission had "progressively involved itself in the problems posed by sex discrimination."[29]

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[26] 452 F. Supp. 612, 631 (W.D.N.Y. 1978), *modified on other grounds*, 633 F.2d 643 (2d Cir. 1979).

[27] *See also, e.g., Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981) (quoting *Rogers*, court holds that Title VII prohibits sexual harassment that created a discriminatory work environment); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied sub nom. Banta v. United States*, 434 U.S. 819 (1977) (quoting *Rogers*, court holds that racially segregated dining facilities for firefighters created a discriminatory work environment prohibited by Title VII); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) (citing *Rogers* for proposition that "the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment").

[28] S. Rep. No. 415, 92d Cong., 1st Sess. 4 (1971).

[29] H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5 (1971), *reprinted in* 1971 U.S. Code Cong. & Ad. News 2,137, 2,140-41. The House

At the time of the 1972 amendments, the EEOC had announced repeatedly that a racially or ethnically harassing work environment violated Title VII. In Decision 70683,[30] for example, the Commission found that derogatory remarks about an employee's national origin in his presence constituted "a tremor [sic] condition of employment [that] is disparate and violates Title VII of the Act." Similarly, in Decision 71-909,[31] the Commission found reasonable cause to believe that an employer violated Title VII by maintaining a working environment in which a supervisor habitually referred to minority employees in a racially insulting manner.[32]

Committee also complimented the courts for "hav[ing] done much to create a body of law clearly disapproving of sex discrimination in employment." *Id.* at 4, *reprinted in* 1971 U.S. Code Cong. & Ad. News at 2,140 (citations omitted). Among the decisions cited by the Committee was *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), where the Fifth Circuit held that Title VII prohibited an airline from refusing to hire male flight attendants. After examining the legislative history of Title VII's prohibition against sex discrimination, the *Diaz* court concluded that this prohibition must be broadly construed. "[T]he purpose of the Act was to provide a foundation in the law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enhance individuals to develop as individuals." *Id.* at 386-87. Likewise, in *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 232, 235 (5th Cir. 1969), which also was cited by the House Committee, the court described Title VII as "a humanitarian remedial statute" that was to be viewed expansively as "providing a foundation in law for the principle of nondiscrimination."

[30] 2 Fair Empl. Prac. Cases (BNA) 606, 607 (1970).

[31] 3 Fair Empl. Prac. Cases (BNA) 269, 270 (1970).

[32] *Accord* EEOC Dec. 71-1442, 3 Fair Empl. Prac. Cases (BNA) 493, 493 (1971) (racial insults in the workplace violate Title VII); EEOC Dec. 71-2042, 3 Fair Empl. Prac. Cases (BNA) 1002, 1003 (1971) (Title VII prohibits white supervisor from requiring black

As noted previously, Congress unequivocally intended that its prohibitions against sex discrimination be interpreted in precisely the same manner as its prohibitions against discrimination on account of race, color, religion, national origin, and sex.[33] Congress' endorsement of the views of the courts and the EEOC that Title VII prohibits any ethnically or racially harassing work environment, mandates that this protection be afforded to victims of sexually discriminatory work environments as well.

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employees to address her as "maam"); EEOC Dec. 72-0779, 4 Fair Empl. Prac. Cases (BNA) 317, 318 (1971) (supervisor's use of racial epithets violated Title VII); EEOC Dec. 71-2598, 4 Fair Empl. Prac. Cases (BNA) 21, 22 (1971) (employer violated Title VII by subjecting employee to "derogatory racial remarks and by ridiculing her because of her race"); EEOC Dec. 72-1561, 4 Fair Empl. Prac. Cases (BNA) 852, 852 (1972) ("Reasonable cause exists to believe that employer violated Title VII by tolerating atmosphere of intimidation in which Negroes and Spanish surnamed Americans as a class were subjected to barrage of racial and ethnic 'jokes' and derogatory rest room wall graffiti.").

Moreover, in one decision the Commission found that an employer had created a sexually discriminatory work environment. In Decision 72-0679, 4 Fair Empl. Prac. Cases (BNA) 441, 442 (1971), the Commission found reasonable cause to believe that an employer's repeated references to adult Negro women as "girls" violated Title VII's sex and race provisions. The Commission reasoned that:

> [W]e cannot ignore the historical pattern of referring to male employees as men, while referring to female employees as "girls." Inherent in the historically disparate treatment is an implication of female inferiority as well as a reminder of the historical pattern of classification of jobs as "male" or "female," with females precluded from virtually all more challenging and higher paying jobs.

Id. at 442.

[33] *See supra* pages 5-8.

II. CONGRESS INTENDED THAT EMPLOYERS BE HELD TO THE SAME STANDARD OF LIABILITY FOR THE SEXUALLY HARASSING CONDUCT OF THEIR SUPERVISORY EMPLOYEES AS IS APPLIED IN ALL OTHER TITLE VII CONTEXTS.

Congress' intent to hold employers responsible for the discriminatory conduct of their supervisory employees is evident from the language of Title VII. The statute defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . *and any agent of such a person.*" [34] Thus, discriminatory actions of a supervisor, or "agent", are the actions of the employer under the Title VII framework. An employer violates Title VII where its supervisor discriminates on account of an employee's race or sex.[35]

Courts uniformly have read Title VII's definition of "employer" to mandate employer responsibility for the racially, ethnically, and religiously discriminatory conduct of supervisors acting within the course of their employment.[36] Employers have been held liable both where the

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[34] 42 U.S.C. § 2000e(b) (1982) (emphasis added).

[35] Section 706(g), 42 U.S.C. § 2000e-5(g) (1982), requires only that the supervisor's discriminatory acts have been done intentionally, *i.e.*, that the supervisor treated an employee unfavorably because of the employee's race or sex. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976); *see also Rowe v. General Motors Corp.*, 457 F.2d 348, 359-60 (5th Cir. 1972) (Section 706(g) requires that the unlawful "activity or practice *was not accidental*") (emphasis in original). It does not relate to the question of employer responsibility for the acts of its agents.

[36] *See, e.g., Calcote v. Texas Educational Foundation, Inc.*, 578 F.2d 95, 98 (5th Cir. 1978) (employer liable for racially harassing remarks of supervisor that created discriminatory work environment because "the acts done . . . were within the course of his duties as supervisor"); *Young v. Southwestern Savings & Loan Association*, 509 F.2d 140, 141 (5th Cir. 1975) (employer liable for religiously discriminatory acts of supervisor which lead to constructive discharge); *Lucero v. Beth Israel Hospital & Geriatric Center*, 479 F. Supp. 452, 455 (D. Colo. 1979) (employer liable for supervisor's racially discriminatory treatment of employees); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976) (employer liable "[w]hen a person vested with managerial responsibilities embarks upon a course calculated to demean an employee before his fellows because of the employee's professed religious views"). *See also Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977); *Slack v. Havens*, 522 F.2d 1091, 1092 (9th Cir. 1975); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972); *United States v. United States Steel Corp.*, 371 F. Supp. 1045, 1054 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *Ostopowicz v. Johnson Bronze Co.*, 369 F. Supp. 522 (W.D. Pa. 1973), *modified*, 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971).

supervisor's wrongful conduct affects an economic aspect of employment and where it fosters a harassing or otherwise discriminatory work environment.[37] The touchstone of employer liability in each instance is whether the supervisor acted intentionally and in the course of his employment.[38] Any other reading of Title VII would produce the anomalous result that Congress intended a narrower scope for Title VII's protective provisions than for the protective provisions of other important labor legislation.[39]

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[37] *See supra* note 36.

[38] The courts recognize in Title VII cases that the harassing acts of a supervisor that create a discriminatory work environment for his subordinates are acts performed in the course of the supervisor's employment. *See Calcote v. Texas Education Foundation, Inc.*, 578 F.2d 95, 98 (5th Cir. 1978); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976).

[39] The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), for example, defines employer to include "any person acting as an agent of an employer, directly or indirectly." *Id.* § 152(2). Although, like Title VII, the legislative history of the NLRA does not directly state that employers are liable for the unlawful acts of their employees, the courts have held that an employer is responsible for its supervisor's unlawful acts performed in the course of their employment. *See Texas Aluminum Corp. v. NLRB*, 435 F.2d 917, 919 (5th Cir. 1970); *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962).

The courts' uniform and long-standing view that employers are liable for the acts of their agents furthers Title VII's remedial purpose of eradicating the "entire spectrum" of employment discrimination.[40] Employer liability ensures that a victimized employee can secure redress, in the form of both monetary and injunctive relief, "from the only source capable of providing it." [41] Employer liability also induces employers to take an active role in eliminating all vestiges of discrimination from the workplace. Employer participation in eliminating discrimination is the precise result Congress intended when it enacted Title VII more than twenty years ago.[42]

Title VII's definition of "employer" applies equally to agents discriminating because of an employee's race and to agents discriminating on account of an employee's sex.[43] Congress unequivocally has mandated that its prohibition against sex discrimination be interpreted as strictly as its prohibitions against other forms of discrimination set out in Title VII.[44] Nowhere in the legislative history does Congress intimate that a different (and lower) standard of employer responsibility be applied to one particular instance of sexual discrimination—sexual harassment. Faithfulness to the language and intent of Title VII requires that an employer's liability for its agents' sexually harassing acts be measured by the

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[40] Title VII is a remedial statute, and remedial statutes must be liberally construed to effectuate their purposes. *See, e.g., Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be broadly construed to effectuate its purposes.").

[41] *Vinson v. Taylor*, 753 F.2d 141, 151 (D.C. Cir. 1985).

[42] *See, e.g.*, 110 Cong. Rec. 7,212-15 (1964), *reprinted in Leg. Hist.* at 3,044 (EEOC should seek employer's voluntary compliance and work toward the "principal goal [of] insur[ing] future compliance with the Title").

[43] 42 U.S.C. § 2000e(b) (1982).

[44] *See supra* pages 5-8.

identical standard of liability uniformly applied in every other Title VII context.

Notwithstanding Congress' explicit directive that sex discrimination be treated identically to other forms of invidious discrimination, petitioner and government amici curiae propose to single out victims of a particular form of sex discrimination—sexual harassment—for less favorable treatment than granted by statute to victims of every other form of discrimination. Not only do such proposals contravene Congress' intent, but they seriously frustrate Title VII's remedial purpose by effectively insulating employers from liability in most supervisory sexual harassment cases.[45] This Court must reject now, as it has rejected before, proposals like these "that nowhere appear[] in the Act, that . . . [were] never mentioned by Congress during the legislative process, that . . . [do] not comport with Congress' intent, and that restrict[] . . . a remedial Act." [46]

The restrictive standard of employer liability proposed by government amici curiae must be rejected for another, independent reason. The government's standard imposes upon victims of sexual harassment an additional exhaustion of remedies requirement not found anywhere in the statute.[47] Congress already has enumerated those exhaus-

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[45] Under the standard proposed by the United States and the EEOC, an employer shields itself from liability for the sexually harassing conduct of its supervisors simply by providing a "reasonably available . . . avenue of complaint" to victimized employees. (U.S. Br. 26). The Bank's proposed standard is even more extreme, calling for employer responsibility only where the acts of harassment are known to the employer and the employer has an opportunity to correct them. (Pet. Br. 20).

[46] *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 n.33 (1981) (quoting *Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 278-79 (1977)).

[47] Government amici curiae propose that the standard of employer liability for a supervisor's sexual harassment depend upon whether the employer established an "avenue of complaint" for sexual harass-

tion preconditions necessary to pursuing a sex discrimination claim under Title VII.[48] The government amici curiae are not free to "engraft on the statute a[n additional] requirement which may inhibit a review of claims of employment discrimination in federal court." [49]

III. THE EEOC'S GUIDELINES ON SEXUAL HARASSMENT—WHICH MAKE THE EMPLOYER LIABLE FOR ALL ACTS OF ITS AGENTS AND SUPERVISORY EMPLOYEES—ARE ENTITLED TO GREAT DEFERENCE.

Congress charged the EEOC with the responsibility to enforce and interpret Title VII.[50] After careful consideration of the problem of sexual harassment,[51] the EEOC promulgated Guidelines on Sexual Harassment ("Guidelines") on November 10, 1980. The Guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," which, among other things, have the purpose or effect of creating "an intimidating,

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ment victims and whether the employee victim used this grievance mechanism. A victim's failure to adhere to this grievance procedure results in the "presumption that the claimed harassment never took place." (U.S. Br. 30). This presumption effectively compels victims of sexual harassment to invoke the employer's grievance procedure or risk foregoing their claims.

[48] *See* 42 U.S.C. § 2000e-5 (1982).

[49] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973). *See also Miller v. Bank of America*, 600 F.2d 211, 214 (9th Cir. 1979) ("[W]hile Congress has established certain preconditions to suit, it has not established use of an employer's personnel procedures as such a condition.").

[50] *See* 42 U.S.C. §§ 2000e-4, -5 (1982).

[51] The Commission published interim Guidelines on Sexual Harassment on April 11, 1980 (45 Fed. Reg. 25,024) and solicited comments on them. After thoroughly reviewing the hundreds of comments it received, the Commission issued its Final Guidelines seven months later. 45 Fed. Reg. 74,676 (Nov. 10, 1980).

hostile or offensive working environment." [52] The Guidelines also provide that:

> Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.[53]

The deference generally to be accorded EEOC guidelines depends upon the thoroughness of their consideration, the validity of their reasoning, and their consistency with prior agency pronouncements.[54] The Guidelines on employer liability for sexual harassment fare well under these standards. As noted, the Guidelines are the product of the agency's thorough consideration of the problem of

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[52] 29 C.F.R. § 1604.11(a)(3) (1985). The Commission's definition of a harassing work environment as a form of prohibited sex discrimination accords with Congress' intent and with the holding of every court to address the question, which "affords good reason to treat the Guidelines as expressing the will of Congress." *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

[53] 29 C.F.R. § 1604.11(c) (1985). The Guidelines go on to state that: "The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts *in either a supervisory or agency capacity*." *Id.* (emphasis added). The United States and the EEOC contend that their novel standard of employer liability for sexual harassment is merely an "elaboration" of the rule set forth in the Guidelines, because their standard requires a court to " 'examine the circumstances of the particular employment relationship' in determining *when a supervisor acts as the employer's agent*." (U.S. Br. 27 (emphasis added)). The Guidelines, however, state that the Commission will look at all of the surrounding circumstances to determine whether an individual acts either as a supervisor or an agent—if the individual acts in *either* capacity the employer is liable for that individual's conduct based on the first sentence of Section 1604.11(c).

[54] *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

sexual harassment in the workplace.[55] Further, the Guidelines faithfully follow Congress' mandate that sex discrimination be measured by the same legal standards that apply to other forms of discrimination.[56]

In addition, the Guidelines are consistent with the Commission's previous pronouncements in the area of employer liability for sexual harassment. Prior to 1980, the EEOC had made clear that an employer was responsible for the conduct of its supervisors that created a racially or ethnically harassing and offensive work environment.[57] The EEOC also had expressed an intention to apply the same standard of liability to conduct creating a sexually harassing workplace.[58] Thus, the Guide-

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[55] *See supra* note 51.

[56] *See* 45 Fed. Reg. 25,024, 25,024 (April 11, 1980) ("Interim § 1604.11(c) applies general Title VII principles to the issue of sexual harassment . . . ."); Sexual Harassment in the Federal Government, Hearings Before the House Subcommittee on Investigation of the Committee on Post Office and Civil Service (Part II), 96th Cong., 2d Sess. 41-42 (1980) (Statement of Eleanor Holmes Norton, EEOC Chair) ("The Commission sees no basis for making a distinction in this regard between liability [of an employer] for sexual harassment and liability for other forms of discrimination prohibited by Title VII.").

[57] *See, e.g.*, EEOC Dec. 71-909, 3 Fair Empl. Prac. Cases (BNA) 269, 269 (1970) ("An employer is responsible for the behavior of its agents within the course of their employment."); EEOC Dec. 71-1545, 3 Fair Empl. Prac. Cases (BNA) 761, 762 (1971) ("Charging Party's Foreman was an authorized agent of Respondent, for whose behavior Respondent is accountable.").

[58] "In a number of cases we have forcefully argued, on behalf of charging parties, for the application of Title VII to sexual harassment situations . . . .

"We have insisted that sexual discrimination, like racial discrimination, generates a psychologically harmful atmosphere and that Title VII guarantees female employees as well as black employees a working environment free of discriminatory intimidation.

"And we have stated that common law tort concepts dictate that:

> *The fact that the employer has cautioned against, or even strictly forbidden conduct—is not sufficient to absolve it from*

lines stand as the culmination of the EEOC's consistent position that an employer is responsible for the harassing conduct of its supervisors.

Until now, the EEOC itself has interpreted the Guidelines to mean that an employer is absolutely liable for the sexually harassing conduct of its supervisors performed in the course of their employment. The Guidelines' preamble provides that "the *strict liability* imposed in § 1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees."[59] The Commission has recently and consistently adhered to this view.[60] Courts and commentators alike that have considered the Guidelines also understand them, rightly, to provide for absolute employer liability.[61]

> *liability*; the employer must take every step necessary . . . to ensure that such action is effectively prevented."

Sexual Harassment in the Federal Government, Hearings Before the House Subcommittee on Investigation of the Committee on Post Office and Civil Service (Part I), 96th Cong., 1st Sess. 92 (1979) (Testimony of Eleanor Holmes Norton, EEOC Chair) (quoting EEOC Brief Amicus Curiae, *Corne v. Bausch & Lomb, Inc.*, 562 F.2d 55 (9th Cir. 1977) (emphasis added).

[59] 45 Fed. Reg. 74,676, 74,676 (Nov. 10, 1980) (emphasis added).

[60] *See* Sexual Harassment in the Federal Government, Hearings Before the House Subcommittee on Investigation of the Committee on Post Office and Civil Service (Part II), 96th Cong., 2d Sess. 41 (1980) (Testimony of Eleanor Holmes Norton, EEOC Chair) ("This degree of *strict liability* is well-established in case law and is in keeping with the general standard of employer liability for the acts of agents and supervisory employees.") (emphasis added). *See also, e.g.*, EEOC Dec. 81-18, 27 Fair Empl. Prac. Cases (BNA) 1793, 1794 (1981) (Guidelines make clear that "an employer can be held *strictly liable* for a supervisor's acts of sexual harassment") (emphasis added); EEOC Dec. 81-17, 27 Fair Empl. Prac. Cases (BNA) 1791, 1792 (1981) (same).

[61] *See Vinson, supra*, 753 F.2d at 149; *Ferguson v. E.I. Du Pont de Nemours & Co.*, 560 F. Supp. 1172, 1198 (D. Del. 1983) ("The EEOC guidelines provide that an employer is strictly liable for sexual harassment by supervisory personnel."); *Hayden v. Atlanta*

In light of the Commission's consistent and explicit understanding of its own Guidelines, little credence should be accorded to the EEOC's newfound reluctance to hold employers responsible for the sexually harassing conduct of their supervisory employees.

CONCLUSION

For the foregoing reasons, amici curiae members of Congress ask the Court to uphold Congress' intent that Title VII protect women employees from a sexually harassing work environment, and that an employer be held liable for the conduct of its supervisory employee creating such an environment. The judgment of the Court of Appeals for the District of Columbia Circuit must be affirmed.

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AMICUS CURIAE

BRIEF

No. 84-1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,
Petitioner,

v.

MECHELLE VINSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE COAL EMPLOYMENT PROJECT, THE COALITION OF LABOR UNION WOMEN AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
STATEMENT OF THE CASE	2
1. The Pertinent Underlying Facts and the District Court Proceedings	2
2. The District Court Opinion	2
3. The Court of Appeals' Opinion	7
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. This Case Does Not Present A Clear, Fully Developed Factual Record Sufficient To Serve As A Basis For Deciding The Complex And Important Legal Questions Tendered By Petitioner	11
II. Employers Are Liable Under Title VII For Sexual Harassment of an Employee By a Superviser	25
CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 24
Amalgamated Clothing Workers v. NLRB, 365 F.2d 898 (D.C. Cir. 1966) 28
American Society of Mechanical Engineers ("ASME") v. Hydrolevel Corp., 456 U.S. 556 (1982) 28-29
Anderson v. City of Bessemer City, N.C., —— U.S. ——, 105 S.Ct. 1504 (1985) 20, 21
Bellissimo v. Westinghouse Electric Corp., 34 FEP 1498 (W.D. Pa. 1984) 23
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 7, 13
Compston v. Borden, 424 F.Supp. 157 (S.D. Ohio 1976) 23
Conley v. Gibson, 355 U.S. 41 (1957) 12
Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) 18
Dean v. Civiletti, 670 F.2d 99 (8th Cir. 1982) 23
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 27
Graves Trucking, Inc. v. NLRB, 692 F.2d 470 (7th Cir. 1982) 27
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 18, 23
Hishon v. King & Spalding, 467 U.S. 69 (1984) 27
Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985) 18, 26, 29, 30
International Ass'n of Machinists v. NLRB, 311 U.S. 72 (1940) 26, 28
Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228 (1972) 24
Joshi v. Florida State University, 646 F.2d 981 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982) 23
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 18, 23
McAllister v. United States, 348 U.S. 19 (1954) 21
Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981) 24, 25
Needleman v. United States, 363 U.S. 608 (1959) 25

TABLE OF AUTHORITIES—Continued

Page

New York v. Uplinger, —— U.S. ——, 104 S.Ct. 2332 (1984) 24, 25
NLRB v. Arkansas-Louisiana Gas Co., 333 F.2d 790 (8th Cir. 1964) 28
NLRB v. Federbush Co., Inc., 121 F.2d 954 (1941) 27
NLRB v. Gissell Packing Co., 395 U.S. 575 (1969) 27
NLRB v. Kaiser Agr. Chem., 373 F.2d 374 (5th Cir. 1973) 27
Pullman-Standard v. Swint, 456 U.S. 273 (1982) 20
Rachbach v. Cogswell, 547 F.2d 502 (10th Cir. 1977) 20
Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 25
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 24
Tacon v. Arizona, 410 U.S. 351 (1973) 25
The Monrosa et al. v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 24
Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) 18
United States v. Dallas County Comm'n., 739 F.2d 1529 (11th Cir. 1984) 20
Vista Verde Farms v. ALRB, 29 Cal. 3d 307 (1981) 28
Wainwright v. New Orleans, 392 U.S. 598 (1967) 24, 25
Walker v. Ford Motor Co., 634 F.2d 1355 (11th Cir. 1982) 23
Warth v. Seldin, 422 U.S. 490 (1975) 24

Statutes:

Civil Rights Act of 1964, as amended, 42 U.S.C., §§ 2000e-2000e-17 (1982) ..... *passim*
Fed. R. Civ. Pro. 15(b) 23
Fed. R. Civ. Pro. 54(c) 23
National Labor Relations Act, as amended, 29 U.S.C. §§ 151-167 (1982) 25, 26

Miscellaneous:

Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924) 19

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE COAL EMPLOYMENT PROJECT, THE COALITION OF LABOR UNION WOMEN AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

This brief *amici curiae* is filed with the consent of the parties as provided for in this Court's Rules.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 94 national and international unions having a total membership of approximately 13,000,000 working men and women.

The Coal Employment Project (CEP) is a non-profit organization formed in 1977 to perform educational and legal functions to eliminate systemic sexual discrimination in the coal mining industry.

The Coalition of Labor Union Women (CLUW) is a nationwide organization consisting of union members working within the labor movement to achieve social, economic and workplace equality for women. Founded in 1974, CLUW's present membership exceeds 18,000 in numerous state and local chapters throughout the country.

The National Education Association (NEA) is a nationwide employee organization, with a current membership of approximately 1.7 million members, the vast majority of whom are employed by public education institutions. NEA operates through a network of affiliated organizations. It has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States.

One of the principle purposes of the AFL-CIO, of CEP, of CLUW and of the NEA and of their affiliates is to protect the constitutional and statutory rights of employ-

ees, including the right of employees to be free from sexual harassment in the workplace.

STATEMENT OF THE CASE

In this brief *amici curiae* we will argue, *inter alia*, that the writ of certiorari should be dismissed as improvidently granted. It is to provide the Court with the background necessary fully to understand why we believe the record in this case provides an insubstantial base from which to evaluate the complex and highly sensitive issues raised by the parties that we present a fairly comprehensive summary of the factual development and procedural posture of this case.

1. The Pertinent Underlying Facts and the District Court Proceedings.

On September 22, 1978, Mechelle Vinson filed a Title VII of the Civil Rights Act of 1964 action in federal district court alleging that her immediate supervisor, Sidney Taylor, an Assistant Vice-President and Branch Manager of the Meritor Savings Bank, had during the course of her employment "constantly subjected [her] to sexual harassment," by seeking "sexual favors and relations with [her] as an inducement for retaining her employment," and by forcing her "to have sexual intercourse with him using the threat that if she refused, she would be terminated from her employment." (Complaint at ¶¶ 8-10.) Vinson further alleged in her complaint that Taylor had "also sexually harassed numerous other female employees of the [Bank] and [that] said conduct constitutes a well-known pattern of behavior which has been known to the officials of [the Bank] for many years." (Complaint at ¶ 14.)

On December 11, 1978, less than two months after filing her complaint and barely one month after she ceased employment with the Bank, Vinson sought leave to file an amended complaint. The proposed amendment alleged additional facts to support a claim of constructive discharge and to describe Taylor's sexual harassment of other female employees of the Bank. The proposed amendment to the complaint also named as plaintiffs two other female Bank employees alleged to be victims of Taylor's sexual harassment and as an additional defendant the Bank's Vice-President. The District Court denied Vinson's motion for leave to amend in its entirety without discussion, even though the defendants, while opposing the inclusion of additional parties, had not opposed Vinson's request to add a claim of constructive discharge.

On December 30, 1979, Vinson, represented by different counsel, again attempted to amend her complaint; this time to allege two state law torts in addition to constructive discharge, and to request reinstatement and other relief, including a declaratory judgment. The District Court denied this motion as well on the ground of undue delay. The Court of Appeals subsequently upheld this denial of leave to amend, while expressly leaving open the issue of whether the complaint could be amended on remand, and "intimat[ing] no view on the disposition to be made should Vinson renew the motion." (Pet. App. at 4a.)

The parties presented dramatically conflicting testimony during the ensuing 11-day bench trial.

Vinson testified that Taylor forced her to have sexual relations with him, both at the Bank and elsewhere, on the claim that she "owed him" because he had hired her; and that while she had initially resisted his sexual advances, she ultimately yielded to the fear generated by Taylor's statements that "just like he could hire [her], he could fire [her]." Vinson further testified that Taylor fondled her, followed her into the ladies' restroom and exposed himself to her, and that he made suggestive remarks and similar sexual advances to other female bank employees as well. She also testified that in response to her refusal to continue to engage in sexual relations, Taylor retaliated by tampering with her personnel records, lodging spurious complaints about her job perform-

ance, criticizing her work and denigrating her in front of other employees, and that she overheard him telling another employee that he was trying "to get rid of her." (Testimony of M. Vinson, Tr. Jan. 23, 1980, Vol. III at 50-59, 69, 81.)

Vinson contended that she never reported any of this misconduct to Taylor's superiors because Taylor had threatened to kill her or have her raped if she did. (Pet. App. at 32a.) Moreover, under the terms of the Bank's internal grievance procedure, Vinson would have been required to file any such misconduct complaint with Taylor himself, who then would have an opportunity to respond to the allegations before transmitting the complaint to his own superiors. (Pl. Ex. 13.) Vinson alleged that Taylor's harassment caused her extreme physical and emotional distress, manifesting itself in unusual weight loss, nervousness, insomnia and hair loss, and that these work-related pressures eventually forced her to terminate her employment at the bank. (Testimony of M. Vinson, Tr. Jan. 23, 1980, Vol. III at 50-51.)

Vinson sought to call witnesses to support her claim that Taylor made sexual advances to other Bank employees and that "the environment was ripe for the exploitation that went on." (Testimony of C. Malone, Tr. Jan. 21, 1980, Vol. I at 5.) The District Court refused to allow such testimony, however, except to the limited extent that the evidence related to the specific question of whether the Bank's Vice-President had actual notice of Taylor's alleged sexual harassment of Bank employees. (*Id.* at 40.) Thus, the District Court repeatedly excluded evidence concerning Taylor's sexual harassment of other female employees as "irrelevant" to what happened to Vinson.[1]

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[1] (*Id.* at 21, 25.) While the District Court noted that such evidence might be appropriate in rebuttal to the defendants' case (Pet. App. at 4a), no such rebuttal evidence was introduced. However, the Court of Appeals subsequently ruled that such evidence would be admissible on remand, as "relevant to the question whether [Taylor] created an environment violative of Title VII." (Pet. App. at 10a.)

Taylor denied that he made unwelcome sexual advances to Vinson or to any other employee, and denied also that he and Vinson had any sexual relationship, even on a consensual basis. Several witnesses for the defendants also testified that Vinson, in their opinion, wore provocative clothing at the Bank, and one witness testified that Vinson discussed her sexual fantasies with co-employees; testimony that the Court of Appeals later ruled should have been excluded. (Pet. App. at 9a & n.36.) The Bank's witnesses also testified that the Bank had an equal employment policy and that its officers superior to Taylor did not know of Taylor's alleged misconduct.[2]

2. The District Court Opinion.

At the conclusion of the trial, the District Court rendered judgment for the defendants, concluding that Vinson "was not the victim of sexual harassment and was not the victim of sexual discrimination" within the meaning of Title VII. (Pet. App. at 44a.) In support of this holding, the District Court found that Vinson "was not required to grant Taylor . . . sexual favors *as a condition of either her employment or in order to obtain promotion*,"

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[2] The Bank's equal employment policy was memorialized in a general four paragraph statement that said the following about post-hiring practices:

> . . . All employment decisions will provide all employees with opportunities for advancement, including upgrading, promotion and training.
>
> The [Bank] will proceed affirmatively to . . . train, promote and institute all personnel policies, conditions and benefits in all job classifications without regard to race, color, religion, sex, age or national origin.
>
> We will expect each of you to carry out your work responsibilities and conduct your relationships with fellow employees in a manner which reflects the highest ethical standards.
>
> We have designated, David G. Burton, Vice President to direct the implementation of the Affirmation Action Program and to make periodic reports to the Board of Directors on its success. The responsibility for implementing this Equal Employment Opportunity policy in all divisions . . . rests with each officer and department head. [Pl. Ex. 12.]

and that her "promotions were based on merit alone." (*Id.* at 42a; emphasis added.) However, the District Court never decided the central factual issue of whether Vinson and Taylor had a sexual relationship, nor did that court make any finding whatsoever with respect to Vinson's other allegations of sexual harassment. Instead, the District Court rested its analysis upon the cryptic finding that "[*i*]*f* the plaintiff and Taylor did engage in an intimate or sexual relationship . . . that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." (*Id.* at 42a; emphasis added.)

The District Court while concluding that Vinson had not been the victim of sexual discrimination, nonetheless reached out to decide the question of the Bank's liability for Taylor's alleged misconduct, framing the issue in terms of whether the Bank had received notice of Taylor's activities. (*Id.* at 37a.)[3] The District Court found that the Bank had not received such notice, and that the absence of such notice, coupled with the Bank's equal employment policy, shielded the Bank from Title VII liability. (*Id.* at 41a.) In reaching its conclusion the District Court refused to accept the testimony of two of Vinson co-employees, Christine Malone and Mary Levarity, that each had specifically complained about sexual

[3] The District Court noted in this regard that "there was no evidence as to Taylor's status in the bank, that is, whether the title Assistant Vice President is honorary or whether that title confers upon Taylor some greater responsibility and relationship to the management of the bank." (*Id.* at 41a.) Regardless of the significance of Taylor's Assistant Vice President title, however, it is undisputed that, as Branch Manager, Taylor had direct supervisorial responsibility over Vinson. The District Court thus found that Taylor had authority to make "written recommendations" concerning the branch employees' raises, bonuses and promotions (*id.* at 40a, 42a-43a), and the trial testimony of bank employees Malone and Levarity demonstrates that Taylor's employment-related recommendations were routinely followed by his superiors at the bank. (*See, e.g.*, Testimony of C. Malone, Tr. Jan. 21, 1980, Vol. I at 7.)

harassment to the Bank's Vice-President. (*Id.* at 38a-41a.)

On March 18, 1980, Vinson filed a motion for leave to appeal *in forma pauperis* and for a government-paid transcript. *See* 28 U.S.C. §§ 753(f), 1915. The District Court denied this motion, concluding *inter alia* that "[the court] cannot find that this appeal presents a substantial question which requires a transcript to be furnished at taxpayers' expense." *Vinson v. Taylor*, 27 FEP 948, 950 (D.D.C. 1980). After the Court of Appeals reversed and remanded this ruling for further consideration in light of Vinson's "changed [financial] circumstances," the District Court on October 30, 1980, granted Vinson's motion to proceed *in forma pauperis*, but again denied her motion to have the Government furnish a trial transcript. The Court of Appeals later affirmed this District Court ruling.

3. The Court of Appeals' Opinion.

The Court of Appeals reversed the judgment of the District Court and remanded the case for a new trial, principally for reconsideration of Vinson's sexual harassment claims in light of *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), an earlier D.C. Circuit decision holding that pervasive on-the-job sexual harassment is a Title VII violation whether or not the complaining employee has suffered any economic loss. (Pet. App. at 7a-8a.) Although the District Court had found that Vinson "was not the victim of sexual harassment and was not the victim of sexual discrimination while employed" at the Bank, the Court of Appeals concluded that since the District Court was unaware of the subsequently-issued *Bundy* opinion, that court's findings may have rested upon application of an erroneous legal standard. (*Id.* at 7a-8a n.32.) Under the proper legal standard, the District Court, according to the Court of Appeals, *could have* reached the opposite conclusion, depending upon its resolution of the numerous unresolved disputed factual issues. (*Id.* at 7a-9a.)

Lacking a trial transcript itself, however, the Court of Appeals was hampered in its evaluation of the District Court's findings. The Court of Appeals was also "uncertain as to precisely what the [district] court meant" by its finding that if Vinson and Taylor had a sexual relationship, "that relationship was a voluntary one having nothing to do with her continued employment, . . . advancement or promotions." (*Id.* at 8a.) Such a finding would not preclude a Title VII claim, the Court of Appeals suggested, if the "relationship" (if any) was "unwelcome," even though "voluntary," or if the "relationship" created a substantially discriminatory work environment. (*Id.*) For these reasons, the Court of Appeals remanded the case to the District Court for additional factual development.

The Court of Appeals also reached the issue of the Bank's potential Title VII liability, holding that employers should be liable for sexual harassment by their supervisory personnel regardless of whether higher level company officials receive actual notice of the misconduct. That court relied upon the express language of Title VII, which defines "employer" to include "any agent of such a person" (*id.* at 13a, *quoting* 42 U.S.C. § 2000e(b)), and concluded that any supervisor who has "even the appearance . . . of a significant degree of influence in vital job decisions" is an "agent" for these purposes, because "the ability to direct employees in their work, to evaluate their performancess and to recommend personnel actions carries attendant power to coerce, intimidate and harass." (*Id.* at 17a-18a.) The Court of Appeals further noted that its treatment of such supervisory personnel as "agents" of the employer conformed with "general Title VII principles" and best served the Act's remedial purpose of guaranteeing to each employee a working environment free from illegal discrimination. (*Id.* at 15a-16a.)

SUMMARY OF ARGUMENT

I

For a myriad of reasons, this case is one in which the writ of certiorari should be dismissed as improvidently granted.

First, contrary to the impression created by the Court of Appeals opinion, this case is not one which comes to this Court on the pleadings and which turns on whether the well-pleaded facts are legally sufficient. Rather, there has been a full trial; the District Court has made certain findings of fact; and the Court of Appeals has left those findings basically intact, but has remanded for further factual development of issues not fully explored previously. The Court of Appeals followed that course because the District Court's factual findings do not resolve certain key credibility issues in the case. And, the Court of Appeals opinion does not fill this void by clearly delineating, even hypothetically, the facts that court regarded as critical to determining whether or not the plaintiff has a valid Title VII claim. Because of this unusual state of affairs, there is no clear factual matrix upon which to base a determination of the novel and complex Title VII questions tendered by the petitioner to this Court. In addition, those questions may never have to be resolved at all, depending upon the outcome of this case on remand; in that sense, the issues presented are not only abstract, but hypothetical as well.

Moreover, because the District Court refused to provide respondent with an *in forma pauperis* transcript on appeal, only fragments of the record are before this Court. The result is that this Court could not clarify the factual ambiguities in the case even if it were deemed sound and proper judicial administration to do so.

Finally, it is not clear at this juncture that any relief would be available to respondent even if she were to prevail on the merits. Title VII, as an equitable statute, provides backpay and injunctive relief, but not legal damages. While respondent is no longer employed at the

Bank, the District Court did not pass on her contention that her severance is due to a constructive discharge caused by her supervisor's sexual harassment or on her claim that Taylor tampered with her personnel records. Until remand, the procedural status of the constructive discharge contention and of the personnel records claim will not be resolved. Unless one of these two bases for relief remains viable in this case, it is questionable whether *any* relief would be available.

This Court regularly dismisses writs of certiorari as improvidently granted when, upon closer examination than the processes for granting certiorari allow, it appears that a particular case does not warrant an exercise of the Court's discretionary jurisdiction. Because this case exhibits not one but many of the characteristics that have led this Court to take such action in the past, the writ of certiorari here should be dismissed as improvidently granted.

II

Against the possibility that ths Court nonetheless determines to retain jurisdiction of this case, Part II of this brief states in short form the *amici curiae's* views on the first question presented for review: under what circumstances, if any, an employer is permitted to escape responsibility for job-related sexual harassment by a supervisor of an employee under his or her supervision. We address this issue because it is one that is of particular moment to organizations that represent workers employed by business corporations.

To posit this question, as does petitioner, as involving the imposition of "absolute liability" on an "innocent employer" is to skew the inquiry from the outset. From the point of view of an employee, his or her immediate supervisor, who exercises a significant measure of control over the operation of the workplace and over the employee's job security and advancement, *is the employer*. This perception is not fortuitous; business, to foster workplace discipline and orderly personnel supervision, fosters ex-

actly the understanding that the supervisory staff is the embodiment of the abstract corporate entity.

It is this very authority created by and exploited by the employer that is central to sexual harassment claims such as those here. For, as this Court has recognized several times in cases under the National Labor Relations Act, otherwise innocent behavior takes on a very different, and coercive, coloration when engaged in by a supervisor with the power adversely to affect an employee's wages, hours and working conditions. And this is true whether the behavior is explicitly accompanied by threats of adverse economic impact or not; in either event, there is present in the hierarchial supervisor-employee relationship the implicit message that toleration of the behavior is a requirement of holding one's job. For that reason, principles of apparent authority, applied by analogy if not directly, dictate that the employer be responsible for illegal abuses of the authority the employer has granted its chosen supervisors.

ARGUMENT

I. This Case Does Not Present A Clear, Fully Developed Factual Record Sufficient To Serve As A Basis For Deciding The Complex And Important Legal Questions Tendered By Petitioner.

This case concerns the sexual harassment of employees by their supervisors, a complex, sensitive area of the law under Title VII of the Civil Rights Act of 1964 which this Court has not previously addressed. As the briefs filed on both sides here attest, sexual harassment cases involve a web of difficult legal issues, both substantive and procedural. These issues are particularly difficult because this area requires drawing lines between actionable and nonactionable conduct that are at once workable, responsive to the concerns underlying Title VII, and sensitive to the privacy and personal autonomy interests of potential victims, on the one hand, and supervisors and employees generally, on the other. For a myriad of reasons this case is not well suited to be the

occasion for this Court's initial consideration of this important and potentially complicated area of the law. Rather than deciding this matter now this Court should dismiss this writ of certiorari as improvidently granted and permit the parties to develop a full record in the District Court on remand.

1. In the first place, the case comes to this Court in a very odd posture with respect to how the facts pertaining to the central legal issues have been developed. The Court of Appeals' ultimate conclusion is "that Vinson alleged facts sufficient to state a claim of sex discrimination cognizable under Title VII [and] is entitled to an adjudication of that claim on the evidence." (Pet. App. 21a.) From that locution, one might suppose that this case was decided on the pleadings, and that this Court need only review those pleadings to decide whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). But that, of course, is not at all the procedural situation. There has been a *full trial* of the case; the District Court has made factual findings concerning many of the allegations in the complaint; and the Court of Appeals, while questioning the legal pertinence of some of those findings, has left the facts as found by the District Court for the most part undisturbed. Consequently, it is not possible to treat the case for purposes of resolving the novel legal questions presented as one in which the pleadings provide the framework of facts essential to judicial decisionmaking through the resolution of concrete cases and controversies.

2. At the same time, for two reasons, the factual findings heretofore made in this case also fail to provide that framework.

First, while the District Court did make certain factual findings which the Court of Appeals purported to leave intact, those findings do not resolve the key factual dispute between the parties to the case: whether or not

there was any intimate sexual relationship between Vinson and Taylor. Although the defendants' primary position was simply that there had been no such relationship, the District Court declined to perform perhaps the central function of trial courts—deciding credibility issues where the testimony is in dispute—and instead concluded, hypothetically, that *if* there was such a relationship it was voluntary, "having nothing to do with [Vinson's] continued employment at Capital or her advancement or promotions at that institution." (Pet. App. 42a.) Furthermore, while the District Court noted that Vinson had testified that "Taylor sexually harassed her in other ways including fondling her breasts and buttocks on the job, sometimes in the presence of co-workers, and in entering the ladies restroom when she was there alone, and by sometimes exposing himself to her," (Pet. App. 32a), the fact findings do not expressly credit, or discredit, that testimony.[4] Consequently, the case comes to this Court with both of these key factual questions undetermined. The result is that the Court is being asked to decide legal questions that may, after further findings of fact, turn out not to be necessary to the determination of this case.[5]

Secondly, this case was tried in 1980. At that time neither the EEOC guidelines regarding sexual harassment nor *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the two primary sources for the standard applied by the Court of Appeals and attacked by petitioner in this case, had been issued. Under these circumstances,

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[4] It is, we acknowledge, possible, albeit unlikely, that the District Court meant to subsume the testimony concerning on-the-job behavior not involving sexual intercourse in its hypothetical "fact-finding" concerning the "voluntary" nature of any "intimate or sexual relationship."

[5] For example, if the District Court were ultimately to conclude that there was no sexual relationship between Vinson and Taylor and, further, that Taylor did not engage in either sexual advances of any other aberrant sexual behavior on the job, *none* of the issues presented in the petition for certiorari would, *in fact*, be presented by the case.

it is understandable that the District Court viewed the case as narrowly focused upon the question whether Taylor in fact coerced Vinson to have intercourse with him by placing her job in jeopardy. This perception led the District Court repeatedly to exclude evidence regarding Taylor's sexual advances and other sexual conduct addressed to other female bank employees; that court was of the view that this evidence was "irrelevant" to the alleged relationship between Vinson and Taylor. (Testimony of C. Malone, Tr. Jan. 21, 1980, Vol. I at 21, 25.) In addition, the District Court excluded Vinson's own direct testimony concerning sexual advances and behavior by Taylor tending to show a pattern of his unwelcome sexual advances toward his female subordinates. (Testimony of M. Vinson, Tr. Jan. 23, 1980, Vol. III at 4.) The result is a record, and findings of fact, that provide no sense of the precise character of the behavior which this Court is asked to classify as actionable or not under Title VII.

3. Nor does the Court of Appeals' opinion help to sharpen the factual focus of this case. In that court's view, the District Court had decided the case from an excessively narrow perspective, since the District Court did not address whether Taylor "created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." (Pet. App. 7a.) But the Court of Appeals' opinion is completely opaque as to the "environmental" circumstances that court had in mind. Those circumstances may consist of: (1) the explicit propositions, if any, which had, according to Vinson, but not to Taylor, ended in sexual intercourse 40 or 50 times over a two-year period (as indicated by "a victim's capitulation to on-the-job sexual advances cannot work a forfeiture of her opportunity for redress" [Pet. App. 9a]); (2) those propositions, accompanied by the explicit or implicit threat that a failure to accede would threaten plaintiff's job security (as indicated by the question on remand "whether Taylor

made Vinson's toleration of sexual harassment a condition of her employment" [Pet. App. 10a]); or (3) only the other kinds of sexually-oriented behavior alleged by Vinson (and several other female employees, *see* p. 4, *supra*) which the District Court seemed to view as at best peripheral to the case, and as to which the District Court rigidly limited the development of the facts.[6]

4. One's view of the most basic issue presented for review—whether there is a Title VII cause of action for sexual harassment absent proof of a resulting economic loss—could well differ substantially depending upon which of these complexes of facts is involved. For example, if the case still involves the set of facts originally alleged by Vinson—that is, propositions for sexual intercourse expressly linked to job retention—it is difficult to believe that Title VII would provide re-

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[6] The confusion is created in large part by the cramped reading the Court of Appeals gave to the District Court findings: While the District Court found, expansively, that any sexual relationship between Vinson and Taylor "was a voluntary one . . . having nothing to do with her continued employment" (Pet. App. 52a), the Court of Appeals read this finding as not necessarily resolving the question whether Vinson yielded to Taylor's "advances", if she did, because she wanted to, rather than because she perceived such capitulation to be required in order to keep her job. (Pet. App. 8a-10a.)

Even if the District Court did intend to resolve this issue against Vinson that would not be the end of the matter. Instead, the Court would then be constrained to decide whether a hypothetical fact-finding such as this one is entitled to weight despite the trier of fact's failure to resolve the key credibility issue in the case, and despite the circumstance that the resulting fact-finding is directly at odds with *both* parties' version of the events.

Moreover, even if it were determined that the District Court's eccentric finding is entitled to the usual degree of respect, the question would remain whether that finding is clearly erroneous. Under the circumstances of this case, that question is a truly substantial one. For, since the defense was that there had been no sexual relationship at all, the evidence tending to show that what took place between Taylor and Vinson was not, as Vinson claimed, coerced, is scant to say the least. Yet, resolution of that factual question would be difficult, since this Court, like the Court of Appeals, is hampered by the lack of a complete record. *See* pp. 19-21, *infra*.

dress to a victim who refuses to capitulate and therefore loses her job, but not to one who capitulates and then seeks the aid of the courts in putting a stop to the coercion. On the other hand, a case in which there was on-the-job sexual innuendo and inquisition, but no express proposition or express threat, presents, at the least, sufficiently different circumstances so as to require a more finetuned legal inquiry into the bounds of the Title VII sex discrimination proscription.

A first glance at the briefs filed by the Bank and the *amici curiae* appearing on its behalf is sufficient to provide telling examples of the degree to which the issues in this case turn on one's view of the murky factual context that emerges from the Court of Appeals' ambivalent reaction to the District Court's peculiar findings of fact. For purposes of discussing the liability and evidentiary issues here the Bank views the case as involving only "a personal relationship between a supervisor and a subordinate," instigated simply by "invitations for sex." (Pet. Br. at 27.) Yet, when the Bank somewhat belatedly presents its argument on the logically prior question of whether Title VII supports a cause of action for sexual harassment not resulting in economic loss, its argument takes a much broader view of the factual context, maintaining that even offensive, antisocial, and indisputably undesired behavior is not within the ambit of Title VII's proscriptions unless there is such a loss. The United States and the EEOC, appearing as *amici curiae*, take the contrary view—*viz.*, that Title VII *does* protect employees against their supervisors' unwelcome conduct in certain circumstances whether or not the employee's pay and related benefits are endangered—but then go on for five pages in an attempt to persuade this Court that the District Court's findings should be read as applying that standard and as not clearly erroneous.

While the legal position taken by the Bank and by the federal *amici curiae* on this point diametrically differ, both discussions of this central issue proceed on an entirely abstract level as to the precise nature of the sexual

advances in this case which do, or do not, constitute a violation of Title VII. We are never told what in fact occurred, or who said what to whom.

This abstract approach, of course, is the direct result of the posture of the case: Because the District Court substituted for the version of events recited by the parties its own hypothetical version of what happened and excluded most of the evidence going beyond the alleged incidents of sexual intercourse between Taylor and Vinson, and because the Court of Appeals declined to review the fact findings as such but instead remanded the case for new evidence and new findings, this Court is being asked to choose between very different versions of the substantive reach of Title VII without the factual concreteness it is the office of the case and controversy requirement to provide.

5. The problems in deciding this case at this juncture in its factual development are not limited to the fundamental Title VII violation issue but pertain with perhaps greater force to the issue both the Court of Appeals and the Bank appear to view as the most important of those before the Court: under what circumstances may an employing entity be held responsible under Title VII for sexually harassing behavior by a supervisor.

In the first place, the employer liability question presupposes a finding of actionable sexual harassment. *No* such finding has been made in this case by any court; rather, the only factual finding to this point is that *no* such harassment occurred. It was therefore unnecessary for the District Court to reach the employer liability issue. And, *unless and until* the District Court changes its initial finding on the merits of the sexual harassment claim after remand because of the broadened perspective required by the Court of Appeals, it will be unnecessary for any court to resolve the employer liability issue in this case.

Moreover, while the employer liability issue is framed as involving the imposition of strict liability where "the

employer neither knew nor reasonably could have known of, had no opportunity to stop, and did not intend to permit sexual advances" (Pet. Br., at i), it is far from clear that after full factual development the question will be characterized in this manner. For, once the inquiry broadens from the alleged intimate sexual relationship between Vinson and Taylor to Taylor's overall sexually-charged treatment of the female workforce generally and Vinson particularly, it is possible that the evidence will support a finding that the behavior was so pervasive that responsible bank managers were or should have been aware of it. *See Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Tompkins v. Public Service Elec. & Gas Co.*, 568 F.2d 1044, 1048 (3d Cir. 1977); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80 (3d Cir. 1983); *Horn v. Duke Homes Div. of Windsor Mobile Homes*, 775 F.2d 599, 604 (7th Cir. 1985).

Additionally, two courts of appeals (*Katz, supra; Henson, supra*), and the federal *amici curiae* in their brief before this Court, advocate a standard of employer liability turning upon the precise character of the sexual harassment that is the basis for the cause of action: so-called "quid pro quo" harassment, it is said, involves the authority to affect the employees' job-related economic benefits delegated to the supervisor by the employer, and, consequently, supports a finding of agency, while in a pure "hostile environment" case, "the supervisor is not exercising or threatening to exercise actual or apparent authority to make personnel decisions affecting the victim." (U.S. Br. at 24.)

We argue below that this distinction does not comport with reality, both because the nature of the working environment is itself a "personnel decision affecting the victim" and because, when imposed by a supervisor perceived as having authority over job-related economic benefits, the threat that acceptance of the "environmental" harassment is a condition of remaining employed is implicit even when not explicit. (*See* pp. 24-30, *infra.*) On a record as abstract as the present one, however, the Court may be impeded in evaluating these contrary positions, either generally or as applied to this case. For since we do not know the nature of the environmental harassment, if any, that will ultimately be found to have occurred, it is impossible to illustrate, as we are confident we could on a concrete record, that the scope of authority conferred upon Taylor by the Bank was central both to his ability to control the work atmosphere and to the inherent coerciveness of the situation. That showing, in turn, could be useful to the Court in developing general standards to govern employer liability in this complex area; the adversary system and case and controversy requirements rest in large part on the proposition that judicial decisionmaking is at its best when it proceeds from the concrete to the general in this manner. *See generally* Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924).

In short, this case comes to this Court in a state of factual development that: (1) may render any decision on the novel issues presented unnecessary to the final disposition of the case after remand; (2) will require the Court to consider and resolve contrary views of the existing factual record; and (3) presents the central issues at a level of abstraction inconsistent with effective judicial decisionmaking.

6. There is a further circumstance that could complicate the Court's ability to cope with the factual ambiguities already described, one which this Court had no reason to be aware of in granting the petition for a writ of certiorari: This case was before the Court of Appeals, and comes to this Court, with only a partial transcript of the District Court proceedings.[7]

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[7] Neither party mentioned this circumstance in the papers filed pertaining to granting the writ of certiorari. The Court of Appeals opinion does mention that it did not have a complete transcript available (Pet. App. 4a, n.13) but does not explain either the reason

As a consequence, the Court of Appeals was as a practical matter precluded from reviewing the factual findings made by the District Court. For, under Rule 52 (a) of the Federal Rules of Civil Procedure, an appellate court must accept the trial court's findings of fact unless, *after reviewing the entire record*, the court is left with "the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, —— U.S. ——, 105 S.Ct. 1504, 1511 (1985). Further, when an appellate court perceives that a trial court has applied an erroneous legal standard or failed to make a finding because of an erroneous view of the law, the court may determine the factual question itself if the record permits only one resolution of that issue. *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). The Court of Appeals could not perform either of these tasks here, for the simple reason that *no* "entire record" is in existence.[8] And this Court presently stands in the same position as the Court of Appeals with respect to the District Court's findings of fact. *Anderson v. City of Bessemer*

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for the omission or the skewed and limited nature of the transcripts it did have.

The reason for this state of affairs is that the District Court twice found that "this appeal [did not] present a substantial question" and therefore denied Vinson's request to be furnished, *in forma pauperis*, with a transcript on appeal, pursuant to 28 U.S.C. § 753(f). *Vinson v. Taylor*, *supra*, 27 FEP at 950. The only transcript before the Court of Appeals therefore included those portions of the proceedings the Bank chose to provide. The Bank did *not* choose to provide such key transcripts as those covering the testimony of Taylor and selected the cross-examination of Vinson for transcription but not her direct testimony.

This situation is therefore not one in which the appellant *chose* to proceed without a trial transcript. *Compare Rachbach v. Cogswell*, 547 F.2d 502, 504 (10th Cir. 1977); *United States v. Dallas County Comm'n*, 739 F.2d 1529, 1539-40 (11th Cir. 1984). Nor is it one in which the record available contains the key evidence, or a fairly balanced picture of the proceedings.

[8] It may well be that the Court of Appeals chose the remand option because of this difficulty.

City, N.C., *supra*, 105 S.Ct. at 1513; *McAllister v. United States*, 348 U.S. 19, 20-21 (1954).

As a consequence, even if this Court wished to resolve the factual ambiguities in the present record, it would be disabled from doing so. Specifically, the solution offered by the federal *amici curiae*—a determination by this Court on "the record as a whole" that no actionable sexual harassment on any standard occurred—is simply out of the question without a record to review. The result is that if this Court retains this case, the Court will not be able to avoid in the manner the federal *amici curiae* suggest, determination of the central employer liability question, despite all the difficulties with the factual underpinning for deciding that question described above.[9]

7. The final reason this case is inappropriate for review by this Court at this time is that it is not possible to tell whether there is a live case or controversy between the parties. For, as the record now stands, it is possible that no relief would be available under Title VII even if the merits were resolved in Vinson's favor.[10]

The original complaint in this case was filed while Vinson was still employed by the Bank. That complaint alleged, *inter alia*, that Taylor had altered the

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[9] We note, too, that sensible determination of the third issue presented for review—the admissibility of evidence regarding a Title VII plaintiff's suggestive dress and sexual fantasies—will also be impeded by the limited transcript available. For that transcript apparently contains the testimony of only one of several witnesses who were permitted to present such testimony. (*See* Tr. Jan. 30, 1980, at 14 and 23; Tr. Jan. 31, 1980, Pt. 1, at 11-12, 21, 30-32, 43, 61, 80-81; *compare* Brief for Appellee Bank, D.C. Cir. No. 80-2369.)

[10] The federal *amici curiae* allude to this problem in their brief, at 20 n.12. However, as we illustrate in the text, the situation is considerably more complicated than their analysis suggests, because the District Court's findings of fact do not settle certain factual disputes critical to the question whether any relief will ultimately be available to Vinson if she prevails on the merits. Thus, to the extent the federal *amici curiae* are suggesting that *this* Court could dismiss this case as moot, the suggestion is not tenable.

Bank's personnel records so as to reflect adversely on Vinson, and sought, in addition to compensatory and punitive damages, injunctive reilef. (*See* p. 2, *supra.*)

Shortly after filing that complaint, Vinson's employment at the Bank ended. The circumstances concerning this separation are unclear: Vinson had written a letter of "construct[ive] resignation", citing the harassment at the Northeast branch (Pl. Ex. 9). While the Bank had sent her a letter regarding the cessation of her employment, it is undisputed that Vinson did not receive that letter. (Testimony of D. Burton, Tr. Jan. 31, 1980, Vol. VII at 40-42.) Further, the Bank's letter merely stated that the Bank "assumed [that Vinson had] elected to *voluntarily terminate* [her] employment" with the Bank because she refused to meet with Burton to discuss her absenteeism. (Pl. Ex. 16 (emphasis added).)

After ceasing her employment with the Bank, Vinson tried twice to amend the complaint in this case to add a constructive discharge claim. (*See* pp. 2-3, *supra.*) Although the District Court denied both amendments, the parties nonetheless addressed issues pertaining to the reason for Vinson's separation from the Bank and to her right to back pay in pretrial statements, trial brief and proposed findings of fact and the District Court received testimony regarding these matters. (*See, e.g.*, Testimony of D. Burton, Tr. Jan. 31, 1980, Vol. VII, at 9, 74; Testimony of M. Vinson, Tr. Jan. 23, 1980, Vol. III at 58, 63-64.) The District Court, however, did not resolve the dispute regarding the reason Vinson was no longer employed; instead, that court found only that the bank "*informed* plaintiff that she was terminated due to excessive use of sick leave." (Pet. App. 43a (emphasis supplied).) The District Court did not allude specifically in its findings of fact to the question whether Taylor had made adverse entries in Vinson's personnel records, vindictively or otherwise. And the Court of Appeals' ruling was that while the District Court properly denied the leave to amend the complaint (to add both a constructive discharge and pendent state law claims), "[w]e intimate no view on the disposition to be made should Vinson renew the motion on remand of this case." (Pet. App. 3a.)

The upshot of all this is that it will not be evident until after the remand whether there is *any* relief available to Vinson if she prevails on the merits. The constructive discharge claim may or may not be viable, depending upon whether the District Court on remand either allows an amendment to the complaint or rules that the defendant in effect consented to try that issue in the prior proceedings. *See* Fed. R. Civ. Pro. 15(b); *see also* Fed. R. Civ. Pro. Rule 54(c). If there is no constructive discharge claim, no backpay award or reinstatement would be available. And while correction of personnel records would surely be the kind of equitable relief available under Title VII (*see, e.g., Bellissimo v. Westinghouse Electric Corp.*, 34 FEP Cases 1498, 1503 (W. D. Pa. 1984)), it is not clear whether the District Court, by ruling broadly that no sex discrimination had taken place, discredited Vinson's testimony that Taylor had tampered with the records.

As a general matter, Title VII is an equitable statute that does not provide for compensatory or punitive damages. See *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363-64 (11th Cir. 1982) and cases cited therein. And, as the federal *amici curiae* note (U.S. Br. at 20 n.12), because Vinson is no longer employed at the Bank, injunctive relief addressed to the harassment itself would also be unavailable. While some courts have awarded nominal damages or attorneys' fees in Title VII cases even when no other relief is available,[11] the question of whether such relief should be permitted is at least a substantial legal question in its own right, never decided

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[11] *See, e.g., Henson v. City of Dundee, supra,* 682 F.2d at 905-06; *Katz v. Dole, supra,* 709 F.2d at 253 n.1; *Joshi v. Florida State University,* 646 F.2d 981, 991 n.33 (5th Cir. 1981), *cert. denied,* 456 U.S. 972 (1982); *Dean v. Civiletti,* 670 F.2d 99 (8th Cir. 1982); *Compston v. Borden,* 424 F. Supp. 157, 162 (S.D. Ohio 1976).

by this Court and not yet addressed in this case by the lower courts.

Thus, it is quite possible that this case is one in which, upon remand, it will become clear that there is in fact no live dispute between the parties. In that event, there would be no jurisdiction over the case in the federal courts. *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

8. The sum of all the foregoing is this. When, upon closer examination than the processes for reviewing petitions for a writ of certiorari permit, it develops that the seemingly novel issues advanced by the parties are either not presented by the record at all (*Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972)) or presented in a manner "too opaque to permit any satisfactory adjudication of that question" (*Wainwright v. New Orleans*, 392 U.S. 589 ((1967) (Harlan, J., concurring)), this Court, in pursuit of the principles of selective review which underlie *certiorari* practice, has often dismissed the writ even after oral argument. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77-79 (1955). This is particularly the case where the circumstances meriting dismissal of the writ could not be "'fully apprehended at the time certiorari was granted.'" *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959); *Iowa Beef Packers, Inc. v. Thompson*, *supra*, 405 U.S. at 230.

In this instance, not just one but many of the circumstances that in the past have resulted in dismissal of the writ after full briefing are present. The case may turn out, after remand, to be entirely hypothetical, in there may be no live controversy at all. *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 126 (1981); *New York v. Uplinger*, —— U.S. ——, 104 S.Ct. 2332, 2333 n.2 (1984). Even if this is not the case, seriously disputed issues of fact remain, so that, depending on the credibility findings upon remand, any

or all of the issues now presented may disappear from the case. *Needleman v. United States*, 363 U.S. 608 (1959); *Tacon v. Arizona*, 410 U.S. 351 (1973). The state of the record is certainly at least as ambiguous as in *Minnick*, *supra*, 452 U.S. at 123-27, with the additional problem that, because of the absence of a record due to no fault of the respondent—a circumstance this Court may well not have appreciated when granting certiorari—the ambiguities could not be resolved even if this Court chose to attempt to do so. And, as in *New York v. Uplinger*, *supra*, 104 S.Ct. at 2333, "the diverse arguments presented in the briefs have demonstrated [that] the opinion of the Court of Appeals is fairly subject to diverse interpretations," leaving the questions presented on review less than clear. Most significantly, perhaps, the case presently lacks any factual focus whatever, and therefore presents difficult issues in a novel area of the law in a completely abstract fashion. *Wainwright v. New Orleans*, *supra*; *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75 (1947). Given all of these circumstances, this case is one in which the most appropriate disposition would be dismissal of the writ of certiorari as improvidently granted.

II. Employers Are Liable Under Title VII For Sexual Harassment of an Employee by a Supervisor.

Despite our conviction that this is a case which, upon examination, this Court will decline to determine, and despite the difficulty of discussing the matter on the present record, we wish briefly to address some general principles that, in our view, should govern the first of the three questions presented for review if that question is indeed decided. That issue is the one involving the standards governing employer liability for sexual harassment by supervisory personnel.[12]

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[12] The one aspect of the record in this case that does *not* seem to us to be ambiguous is that pertaining to the supervisory authority of Taylor over Vinson. See n.3 p. 6 *supra*; Pet. App. 40a and U.S. Br. at 29. On the facts adduced Taylor would meet the definition of "supervisor" in § 2(11) of the National Labor Relations Act, 29

Petitioner poses the liability question here as involving whether "innocent employers [are] absolutely liable" for a supervisor's sexual harassment of employees. (Pet. Br. at 15.) That misstatement of the issue skews the inquiry. For,

> [R]eification of the [employer] invites an ill-advised descent into the world of legal fiction. The "company" is a legal form; it can "act" only through its duly-appointed agents. [*Horn v. Duke Homes Div. of Windsor Mobile Homes, supra*, 755 F.2d at 605.]

To an employee, the individual who directs his or her daily work, resolves grievances, and effectively decides upon his or her job security and advancement *is the employer*. Indeed, for reasons of workplace discipline and productivity the employing entity ordinarily encourages this perception. The employment relationship is purposely structured so that the employee will obey the directives of his or her supervisor as those of the employer, and will accept the decisions of the supervisor as those of the employer.

The general recognition in the workplace of the authority of the supervisor as the authority of the employer is central to a sexual harassment case involving a supervisor. It is principally because the supervisor is understood to be clothed with the employer's authority that he or she is able to impose unwelcome sexual conduct upon subordinates. And it is because of this employer authority that such unwelcome behavior by a supervisor has a coercive coloration.[13]

U.S.C. § 162 (11). (There is no definition of a "supervisor in Title VII, nor does that statute expressly use the term.) And there is no dispute that Vinson was one of the individuals whom Taylor supervised.

[13] This latter point can be well illustrated by analogy to cases that have considered, in an NLRA context, the inherent coercive effect in the context of the employment relationship of behavior that outside that relationship might seem innocent or even beneficial. For example, because "[employees] know the consequences of incurring the employer's strong displeasure" (*International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 78 (1940)), verbal presentations that "to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart," (*NLRB v. The Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir., 1941) (L. Hand, J.)). *See generally NLRB v. Gissell Packing Co.*, 395 U.S. 575, 617-18 (1969).

Consequently, the employer liability question presented here is whether an employer may *avoid* liability for otherwise actionable sexual harassment by an employer representative who is clothed with employer-created authority over a subordinate employee on the grounds that: (1) the harassment is against employer policy; (2) the harassment was not known to, or brought to the attention of, individuals on a higher rung in the employing entity's heirarchy than the offending supervisor; (3) the harassment was not undertaken in the employer's interest, but in the harasser's own private interest; or (4) (as the federal *amici curiae* suggest) the harassment was only "environmental", *viz.* harassment in which the supervisor does not seek sexual favors as a *quid pro quo* for permitting the employee to continue to enjoy his or her job-related economic benefits.

Case law under the National Labor Relations Act goes far toward negating the first two possible grounds for eliminating employer liability. The NLRA and the Title VII definitions of "employer" are similar; both refer generally to employers and their agents. *Compare* 42 U.S.C. § 2000e (b) with 29 U.S.C. § 152 (2). As this Court has several times noted, under these circumstances the judicial interpretation of NLRA provisions is "persuasive" and "sheds light" upon analogous Title VII language. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 168-69 (1976); *Hishon v. King & Spalding*, 467 U.S. 69 (1984). And, under the NLRA, it has been clear that it is no defense to unfair labor practice activity by supervisory employees that the activity is against employer policy, or that higher levels of management were not aware or or did not condone the activity.[14]

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[14] *See, e.g., Graves Trucking, Inc. v. NLRB*, 692 F.2d 470 (7th Cir. 1982); *NLRB v. Kaiser Agr. Chem.*, 473 F.2d 374, 384 (5th

This Court articulated the reasons for this approach in the earliest days of the NLRA:

> We are dealing here not with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence. . . . [*International Ass'n of Machinists v. NLRB*, *supra*, 311 U.S. at 80.][15]

Similarly, Title VII expresses a clear legislative policy to eliminate from the workplace the taint of sex discrimination. This policy, like the policy favoring free collective bargaining, cannot be achieved if the employing entity is permitted to divorce itself for purposes of Title VII from the actions of the individuals the entity has provided with the practical power to rule that workplace.

Nor is there any basis for negating employer liability on the ground that sexually harassing activity is not, and is not perceived to be, in the employer's interest. Where a principal has invested an agent with the power that enables the agent to injure others, the fact that the agent uses that power in his own interest and not in the principal's liability. *American Society of Mechanical Engi-*

Cir. 1973); *Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898, 909 (D.C. Cir. 1966).

[15] At the time *Machinists* was decided, § 2(2) of the NLRA defined an employer to include "any person acting in the interest of an employer, directly or indirectly." 49 Stat. 449, 450 (1935). Although that language was modified by the Taft-Hartley Act to include only persons acting "as an agent" of the employer, Congress at the same time added § 2(13), making it clear that, as *Machinists* had held, actual authorization and ratification are not required to establish agency. These changes have been viewed as codifying *Machinists* rather than as repudiating that case. *NLRB v. Arkansas-Louisiana Gas Co.*, 333 F.2d 790 (8th Cir. 1964); *NLRB v. General Metal Products Co.*, 410 F.2d 473, 475 (6th Cir., 1969); *Vista Verde Farms v. ALRB*, 29 Cal. 3d 307, 320 (1981).

neers ("ASME") v. Hydrolevel Corp., 456 U.S. 556, 566-68 and the cases collected *id.*, at 568. To paraphrase this Court's explanation for this rule in *ASME*:

> [I]f . . . [an employer] is civilly liable for . . . violations of its agents acting with apparent authority, it is much more likely that similar . . . violations will not occur in the future . . . Only [the employer] can take systematic steps to make improper conduct on the part of all its agents unlikely. . . . [Also] a ratification rule would have . . . effects directly contrary to the purposes of the [statute] . . . [because the employer] could avoid liability by remaining ignorant of its agents' conduct. . . . [Whether] its agents act with an intent to benefit [the] em[ployer] is simply irrelevant . . . Whether they intend to benefit [the employer] or not, [the employer's] agents exercise economic power because they act with the force of the [employer's authority] behind them . . . [and] have the same . . . effect on the [workplace.] [456 U.S. at 573-574.]

It is true that, unlike the apparent authority relied upon in *ASME*, in workplace sexual harassment cases the victim may have reason to realize that the supervisor is not acting in the larger interest of the employer. *But the key fact remains that it is the authority vested in the supervisor as the personification of the employing entity that enables him or her to commit the wrong. Compare ASME*, *supra*, 456 U.S. at 566. And the fact also remains that it is in the employer's long term interest for employees to respect the authority of supervisors and to see the supervisors as effectively "merged" with the employing entity. *Horn*, *supra*, 755 F.2d at 605. While in sexual harassment situations, the agent trades on his power of economic retaliation rather than on his opportunity to practice deception, the basic principles that favor apparent authority liabililty in the commercial context favor such liability in the supervisory sexual harassment context as well.

Finally, the suggestion that there is some fundamental distinction for purposes of employer liability between

"environmental" harassment and other forms of sexual harassment is simply untenable. In the first place, while in "environmental" harassment cases the threat of adverse economic consequence may not be explicit, that threat is clearly implicit given the structure of the employment relationship. *See* n.13, pp. 25-26, *supra*. An employee would certainly have reason to fear that if he or she complains about or seeks to escape "environmental" harassment inflicted directly by a supervisor, his or her job or advancement prospects will be placed in jeopardy. For the supervisor's power to control the workplace environment is just as clearly derived from his or her employer authority as is the power to affect the economic benefits of employment. Indeed, if anything, the employing entity has a greater interest in merging its identity with that of the supervisor for purposes of daily control of the workplace than with respect to making decisions regarding hiring, firing, and promotion.

In sum, there is no basis in Title VII law or in legal principles generally for regarding as *not* "the employer" the very individual who represents the employer and wields the employer's power with respect to day-to-day employment relations concerning a particular employee.[16]

CONCLUSION

For the reasons stated above, the writ of certiorari should be dismissed as improvidently granted. If jurisdiction is retained, for the reasons stated in Part II, *supra*, the judgment of the Court of Appeals should be affirmed.

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[16] All of the considerations we have canvassed in the text go to the question of an employer's Title VII liability for sexual harassment by supervisors, *viz.* by those who are plainly the employer's agents, and not to distinct, and more difficult, questions of whether an employer is liable for *co-employee* sexual harassment. *Compare Horn, supra*, 755 F.2d at 603 & n.2. Because it is plain, as we have noted, that Taylor was Vinson's supervisor, and given the circumstances detailed in point I of this brief, this case is plainly not one to explore the Title VII ramifications of such *employee* conduct.

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,

Petitioner,

—v.—

MECHELLE VINSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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QUESTIONS PRESENTED

I. Is the sexual harassment of a subordinate female employee by her male supervisor, without any overt threat of loss of tangible job benefits, employment discrimination under Title VII?

II. Is an employer liable under Title VII for acts of sexual harassment by its supervisors absent actual knowledge of the offending conduct?

III. In Title VII actions, is evidence of an employee's general conduct, such as her manner of dress and her sexual fantasies, which is unrelated to her conduct toward her supervisor, admissible to prove that the employee welcomed the supervisor's sexual advances and willingly participated in sexual activities with him?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE PROTECTIONS OF TITLE VII EXTEND TO THOSE WHO SUFFER SEXUAL HARASSMENT BY A SUPERVISOR EVEN IF THERE IS NO OVERT THREAT TO OR ACTUAL LOSS OF TANGIBLE ECONOMIC JOB BENEFITS .. 4

A. Title VII Prohibits Sexual Harassment That Results In The Loss Of Tangible Economic Job Benefits 4

B. Title VII Prohibits Sexual Harassment That Interferes With Job Performance Or Creates A Hostile Work Environment 6

1. Title VII makes no distinction between "quid pro quo" and "environmental" harassment 6

2. The EEOC Guidelines and judicial precedents in the areas of race, religion, and national origin confirm that Title VII applies to non-economic terms and conditions of employment 8

PAGE

3. The courts of appeals have uniformly concluded that sexual harassment violates Title VII even if a tangible economic job benefit is not affected 11

II. UNDER TITLE VII AN EMPLOYER IS LIABLE FOR SEXUAL HARASSMENT COMMITTED BY ITS SUPERVISORY PERSONNEL WITHOUT REGARD TO ITS ACTUAL KNOWLEDGE OF THE OFFENDING CONDUCT 13

A. Title VII Imposes Liability On An Employer For The Acts Of Its Supervisory Personnel... 13

B. Title VII Does Not Require That An Employer Have Notice Or Actual Knowledge Of The Supervisor's Discriminatory Conduct..... 16

III. THE COURT OF APPEALS PROPERLY RULED EVIDENCE OF PLAINTIFF'S SEXUAL FANTASIES AND DRESS INADMISSIBLE 18

A. In Addressing The Question Of "Voluntariness," The Court Of Appeals Was Referring To Coerced Capitulation To Employer Demands Rather Than To A Consensual Relationship 19

B. The Court Of Appeals Properly Excluded Evidence Of Plaintiff's General Conduct 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972) 14, 17

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) 5

Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984) 12

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 6, 9, 11, 12

Calcote v. Texas Educational Foundation, Inc., 458 F. Supp. 231 (W.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978) 14, 17

Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) 10

City of Los Angeles v. Manhart, 435 U.S. 702 (1978) .. 4

Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) 14, 17

Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983)... 9, 18

Dothard v. Rawlinson, 433 U.S. 321 (1977)..... 4

Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985)..... 4, 5, 7, 12

EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381 (D. Minn. 1980) 10, 14, 17

Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977)..... 10

Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) 14, 17

Fox v. Reich & Tang, Inc., 692 F.2d 250 (2d Cir. 1982), *aff'd*, 464 U.S. 523 (1984)..... 17

PAGE

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 9

Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977) 6

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) ... 9

Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 2347 (1984) 10-11

Griggs v. Duke Power Co., 401 U.S. 424 (1971)..... 8, 9

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 5, 9, 12

Hishon v. King & Spaulding, 467 U.S. 69 (1984) 2, 4

Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985) ... 5, 6, 9, 15, 18

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 12

Keenan v. American Cast Iron Pipe Co., 707 F.2d 1274 (11th Cir. 1983) 10

Lucero v. Beth Israel Hospital and Geriatric Center, 479 F. Supp. 452 (D. Colo. 1979) 14, 17

Mays v. Williamson & Sons, Janitorial Services, Inc., 775 F.2d 258 (8th Cir. 1985) 5

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) . 6, 9, 15-16, 18

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)... 4

Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983) 5, 7

Priest v. Rotary, 98 F.R.D. 755 (N.D. Cal. 1983) 21, 22

Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)..... 9-10, 11

PAGE

Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982) 10

Simmons v. Lyons, 746 F.2d 265 (5th Cir. 1984) 5

Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971) 14, 17

Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977) 6

United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978) 10

Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) 10, 11

Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980), *reversed*, 753 F.2d 141, *reh'g en banc denied*, 760 F.2d 1330 (D.C. Cir.), *cert. granted*, 106 S. Ct. 57 (1985) 7

Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985) 7, 13, 14, 16, 18, 19

Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985) 20

Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982) 10

Winfrey v. Metropolitan Utilities District, 467 F. Supp. 56 (D. Neb. 1979) 10

Young v. Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1975) 10, 14, 17

Statutes, Rules and Regulations:

Civil Rights Act of 1964, Title VII
42 U.S.C. § 2000e(b) 13
42 U.S.C. § 2000e-2(a)(1) 4, 13
42 U.S.C. § 2000e-5(b)-(g) 15, 16-17

PAGE

Federal Rules of Evidence
401 20
402 20
403 21
412 .....21, 22
412(b)(2)(B) 22

Guidelines on Discrimination Because of Sex
29 C.F.R. § 1604.11(a) (1985) 4, 8, 17
29 C.F.R. § 1604.11(c) (1985) 13-14

Other Authorities:

C.A. MacKinnon, *Sexual Harassment of Working Women* (Yale Univ. Press 1979) 5

Memorandum of EEOC Acting General Counsel, Johnny J. Butler, to EEOC Chairman and Commissioners, 210 D. Lab. Rep. E-2 (October 30, 1985) ...19, 22

Restatement (Second) of Agency § 228(1)(a)(c) (1958) .. 15

Sex Discrimination in the Workplace: Hearings Before the Committee on Labor and Human Resources, U.S. Senate, 97th Cong., 1st Sess. 336, April 21, 1981 (Statement of J. Clay Smith, Jr., Acting Chairman, EEOC) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1979

MERITOR SAVINGS BANK, FSB,

Petitioner,

—v.—

MECHELLE VINSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

The Women's Bar Association of the State of New York respectfully submits this brief *amicus curiae* in support of respondent Mechelle Vinson's position that the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Vinson v. Taylor*, No. 80-2369, filed January 25, 1985, be affirmed in all respects. The parties' written consents to the submission of this brief have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Women's Bar Association of the State of New York ("WBASNY") is a state-wide membership organization of more than 2,000 female and male lawyers, law graduates, and law students committed to the goal of advancing the status of women under the law, in the workplace, and in all fields of human endeavor. In support of this goal, this organization frequently has participated in cases which seek to secure women's rights and to remove the barriers which prevent women from achieving their full potential in society. Most recently, the WBASNY was granted *amicus* status by this Court in support of the petitioner in *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

The WBASNY seeks to eradicate all forms of sex discrimination and to ensure the full participation of women in the job market. Sexual harassment denies women the opportunity to participate fully and equally in the workplace. The issues presented in this case are of major importance to the goals of the WBASNY and its members. The WBASNY respectfully submits this brief in aid of the Court's resolution of the important questions raised by this case.

SUMMARY OF ARGUMENT

A traditional and comprehensive reading of Title VII and the cases decided under the statute require affirmance of the decision below. Like other forms of prohibited employment bias, including harassment on the basis of race, religion, and national origin, sexual harassment affecting either the tangible or intangible terms, conditions, or privileges of employment is discrimination within the definition of Title VII. The Equal Employment Opportunity Commission ("EEOC") and every circuit that has considered the issue concur in this conclusion.

The language and statutory framework of Title VII, the Guidelines promulgated by the EEOC, and judicial precedents make clear that an employer is liable for the acts of sexual harassment committed by its supervisory personnel regardless of whether the employer is actually aware of their conduct. The employer delegates to these agents the authority to supervise employees, to create conditions of employment, and to establish and control the work environment. This delegation of power to control the work environment is the basis for finding an employer liable if its supervisor/agent's abuse of this power results in Title VII violations. The employer must be liable for its agent's discriminatory acts if the broad, prophylactic purpose of Title VII is to be achieved.

Title VII does not prohibit mutually consensual relationships nor isolated occasions in which one employee asks another for a date. It does prohibit unwelcome sexual advances that unreasonably interfere with the employee's job performance or create an intimidating, hostile, or offensive work environment. A determination of whether sexual harassment has occurred must focus on whether the complainant was subject to persistent, unwelcome sexual advances. Evidence relevant to the question of whether the employee welcomed sexual advances and willingly engaged in a mutually agreeable relationship with the defendant is admissible. However, evidence of the employee's general behavior or conduct, such as her manner of dress or the topics of her unrelated conversations with coworkers, is not relevant because it does not concern the nature of her relationship with her supervisor. Indeed, to permit introduction of this type of general character evidence would frustrate Title VII's remedial purposes and discourage harassed women from bringing legitimate claims.

ARGUMENT

I. THE PROTECTIONS OF TITLE VII EXTEND TO THOSE WHO SUFFER SEXUAL HARASSMENT BY A SUPERVISOR EVEN IF THERE IS NO OVERT THREAT TO OR ACTUAL LOSS OF TANGIBLE ECONOMIC JOB BENEFITS

A. Title VII Prohibits Sexual Harassment That Results In The Loss Of Tangible Economic Job Benefits

By its terms, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, religion, sex, or national origin in hiring, discharging, and compensating employees or with respect to the "terms, conditions, or privileges of [their] employment." Title VII § 703(a), 42 U.S.C. § 2000e-2(a)(1). This Court frequently has held that Title VII prohibits sex discrimination in granting *tangible* job benefits. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (partnership opportunities); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) (pension plans); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (hiring); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (denial of employment to woman with small children).

Sexual harassment can take a variety of forms.[1] Generally, it is offensive behavior of a sexual nature, *Downes v. FAA*, 775 F.2d 288, 290 (Fed. Cir. 1985), directed to an employee because

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1 The EEOC Guidelines define sexual harassment.

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1985) ("Guidelines").

of his or her sex, *Barnes v. Costle*, 561 F.2d 983, 989-90 n.49 (D.C. Cir. 1977). The textbook example of sexual harassment ("quid pro quo") exists where a supervisor makes sexual demands on a subordinate employee in exchange for a promise of career advantages or under threats of adverse consequences to tangible job benefits or employment conditions. *Downes v. FAA*, 775 F.2d at 290; *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982). Harassment also may take a more "subtle"--albeit not less offensive or less threatening--form ("environmental") where persistent, unwelcome, sexually-related conduct by a supervisor "interferes with an employee's work performance" or "creates an intimidating, hostile or offensive working environment, irrespective of whether the [employee] is threatened with actual economic consequences." *Downes v. FAA*, 775 F.2d at 290-91; *Henson v. City of Dundee*, 682 F.2d at 901.[2]

Few would dispute that the conditioning or withholding of job placement, remuneration, promotion, or other tangible job benefits upon the granting of sexual favors is actionable under Title VII.[3] Indeed, every circuit that has examined the issue has concluded that such "quid pro quo" harassment constitutes sex-based discrimination in violation of Title VII. *Downes v. FAA*, 775 F.2d 288 (Fed. Cir. 1985); *Mays v. Williamson & Sons, Janitorial Services, Inc.*, 775 F.2d 258 (8th Cir. 1985); *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985); *Simmons v. Lyons*, 746 F.2d 265 (5th Cir. 1984); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524 (11th Cir. 1983);

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2 Whatever its form, sexual harassment is an onerous problem for women which negatively affects their position in the American work force. *See Sex Discrimination in the Workplace: Hearings Before the Committee on Labor and Human Resources, U.S. Senate, 97th Cong., 1st Sess. 336, April 21, 1981* (Statement of J. Clay Smith, Jr., Acting Chairman, EEOC); C.A. MacKinnon, *Sexual Harassment of Working Women* (Yale Univ. Press 1979); Brief of Working Women's Institute as *Amicus Curiae*.

3 Even the Petitioner concedes that if sexual harassment has a tangible economic impact, it is actionable under Title VII. *See* Brief of Petitioner at 30.

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Garber v. Saxon Business Products, Inc.*, 552 F.2d 1032 (4th Cir. 1977).

The plaintiff in *Horn*, for example, endured a typical form of "quid pro quo" harassment--sexual advances, badgering about her sexual needs, and persistent promises from her supervisor that he would make her job easier if she dated him. The employee was discharged when she resisted these advances. In concluding that the supervisor's sexual harassment was a violation of Title VII, the Seventh Circuit reasoned that

> sexual consideration constitutes precisely the kind of single "artificial, arbitrary, and unnecessary barrier[ ] to employment," that Title VII was intended to prevent. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). But for Horn's womanhood, [the supervisor] would not have demanded sex as a condition of employment. *Accord Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977). Because of her sex . . . Horn was disadvantaged by pressure to submit to an additional, humiliating condition of employment that served no legitimate purpose of the employer. Her right to refuse this condition was protected by Title VII.

Horn v. Duke Homes, 755 F.2d at 603-04.

B. Title VII Prohibits Sexual Harassment That Interferes With Job Performance Or Creates A Hostile Work Environment

1. *Title VII makes no distinction between "quid pro quo" and "environmental" harassment*

Petitioner contends that sexual harassment does not violate Title VII when the employee's supervisor does not actually threaten her with loss of her job or denial of other job benefits and does not adversely affect those benefits. Brief of Petitioner

at 30-36. Under the Bank's theory, as long as Taylor did not articulate these threats or actually affect Vinson's benefits, he could demand sex from her, physically assault her, and tell her she "owed" him for his hiring her,[4] and she must endure it without legal recourse.

Yet conditions, terms, and privileges of employment necessarily include an environment free of sexual abuse and unwelcome sexual conduct. Some circuits have distinguished between "quid pro quo" and "environmental" harassment for purposes of the elements which must be established at trial. *E.g., Downes v. FAA*, 775 F.2d 288, 291-93 (Fed. Cir. 1985). This distinction is, however, imprecise and meaningless for purposes of determining the threshold question of the applicability of Title VII. Threats affecting actual job benefits may never be--or need to be--expressed. An employee may capitulate to her supervisor's demands or tolerate an offensive environment because of a perceived, although unarticulated, threat to her employment status--as did respondent Vinson in this case--or because of her need for continued employment. In that event, tangible job benefits may never actually be threatened or affected, but toleration of the harassment is, nonetheless, a "quid pro quo" not only for any job-related benefits, but for the job itself. Similarly, where an employee is constructively discharged, leaving her job because she can no longer tolerate her employer's sexual harassment, both "quid pro quo" and "environmental" harassment exist. *See Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1529 (11th Cir. 1983) (supervisor's frequent questioning about sexual relations of employee and her husband followed by demands for oral sex constituted "environmental" harassment; when employee resisted and was actually threatened with loss of her job there was "quid pro quo" harassment).

This case has been viewed as one of "environmental" harassment. *Vinson v. Taylor*, 753 F.2d 141, 145 (D.C. Cir. 1985). Yet

4 *See Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 38 (D.D.C. 1980).

the threat perceived by Ms. Vinson, coupled with her submission to Taylor's demands, her lengthy sick leave in circumstances analogous to constructive discharge, and her subsequent termination actually make this case indistinguishable from a "quid pro quo" action.

The "quid pro quo" rubric focuses on the existence of a specific benefit granted or denied, or a specific negative action taken or deferred. The hostile environment is simply a generalization of the "quid pro quo." It consists of an understanding or imposed perception that benefits, in general, or detriments, in general, will be forthcoming or withheld in light of the employee's willingness to tolerate a continuing succession of the unwelcome. If anything, the hostile environment context is more rampant with discrimination than the isolated, specific "quid pro quo."

An employee should not be forced either to endure persistent, unwelcome sexual advances until her supervisor threatens or affects her job benefits or to forfeit her job and immediate income before she can assert a claim under Title VII for this harassment. This Court should affirm the holding below that such a Hobson's choice is unacceptable and violates Title VII. Any other holding would endorse acts of sexual harassment by supervisors who do not articulate threats and would make submission to sexual abuse a legally-acceptable condition of employment.

2. *The EEOC Guidelines and judicial precedents in the areas of race, religion, and national origin confirm that Title VII applies to non-economic terms and conditions of employment*

The EEOC lends its persuasive authority to the proposition that all forms of sexual harassment are impermissible under Title VII. *EEOC Guidelines*, 29 C.F.R. § 1604.11(a) (1985), *supra* note 1. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). Indeed, the Guidelines support the position that the demarcation between "quid pro quo" and "environmental" harassment is illusory and not required by Title VII. Given the

validity and thoroughness of the EEOC's reasoning and the fact that the Guidelines have been endorsed by every circuit reviewing them,[5] the Court should give substantial weight to the EEOC's interpretation. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

The EEOC Guidelines are consistent with this Court's statements that Title VII is to be liberally construed to effectuate Congress' remedial and prophylactic purposes—"the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. at 431. This Court has recognized that, through Title VII, "Congress intended to prohibit *all* practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . ." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) (emphasis added).

The principle that discrimination can affect more than traditional tangible or economic job benefits was first recognized in cases involving racial discrimination. The oft-quoted opinion of Judge Goldberg in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), succinctly sets forth the rationale for including intangible job conditions within the scope of Title VII:[6]

> [T]oday employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties

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5 *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985); *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

6 Contrary to Petitioner's assertions, Petitioner's Brief at 34, the views expressed in Judge Goldberg's opinion are not personal to him. They have been consistently relied upon by other circuits and cited with approval by other panels of the Fifth Circuit. *See* cases cited *infra* at 10.

> of discriminatory employment practices are no longer confined to bread and butter issues.

Id. at 238. Judge Goldberg properly recognized that Title VII must be liberally construed to eliminate the "inconvenience, unfairness, and humiliation" of discrimination in "intangible fringe benefits" and concluded that the statutory reference to "terms, conditions, or privileges of employment" is an "expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination." *Id.; accord Keenan v. American Cast Iron Pipe Co.*, 707 F.2d 1274, 1277 (11th Cir. 1983) (employer's policy of reprimanding employees whose salaries are garnisheed is a condition of employment under Title VII).

The courts are uniform in their conclusion that the work environment is a "term, condition, or privilege of employment" and that repeated incidents of abuse relating to national origin, race, or religion by a supervisor give rise to Title VII claims. *See Gilbert v. City of Little Rock*, 722 F.2d 1390, 1394 (8th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 2347 (1984) (race); *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88 (6th Cir. 1982) (race); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982) (race); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982) (race); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (national origin); *Firefighters Institute For Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (race); *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975) (religion); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381 (D. Minn. 1980) (race); *Winfrey v. Metropolitan Utilities District*, 467 F. Supp. 56 (D. Neb. 1979) (race); *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978) (race).

In *Gilbert*, the Eighth Circuit upheld a claim by black employees that racial slurs, derogatory epithets, and racially-oriented graffiti and cartoons that pervaded the workplace violated Title VII:

> A working environment dominated by racial hostility and harassment constitutes a violation of Title VII, regardless of any other tangible job detriment to minority employees. An employer violates Title VII simply by creating or condoning an environment at the work place which significantly and adversely affects the psychological well-being of an employee because of his or her race.

Gilbert v. City of Little Rock, 722 F.2d at 1394; *accord Vaughn v. Pool Offshore Co.*, 683 F.2d at 924.

3. *The courts of appeals have uniformly concluded that sexual harassment violates Title VII even if a tangible economic job benefit is not affected*

The rationale of *Rogers* and its progeny in racial, religious, and ethnic bias cases applies with equal force to claims of sexual harassment. *Rogers* also underscores the need to prevent this invidious form of employment discrimination: "As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees." *Rogers v. EEOC*, 454 F.2d at 239; *see Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). Although overt sexual and racial discrimination by an employer resulting in inequality in employment, promotion, or salary remains a problem, the incidence of such discrimination has declined since it has become clearly actionable.

An employer's creation of a hostile environment for the purpose of inducing women to seek employment elsewhere would plainly not withstand Title VII scrutiny. The creation of the same environment for the purpose of inducing women to accept sexually abusive behavior as an additional condition of employment is no better.

The circuits which have reviewed so-called "environmental" sexual harassment claims have consistently adopted the view that such harassment is actionable under Title VII even if it

does not affect tangible job benefits. *See Downes v. FAA*, 775 F.2d at 292-93; *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 887, 902 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d at 945. These courts have recognized that any other determination would permit an employer who stops short of firing, threatening, or otherwise affecting an employee's benefits to demean her, insult her, or foist his attentions upon her with impunity. Yet often it is the psychological impact of such continuous, debilitating, unwelcome advances or verbal abuse that discourages women from active participation in the work force. Brief of the Working Women's Institute as *Amicus Curiae*; Brief of the Women's Bar Association of Massachusetts, *et al.* as *Amicus Curiae*.

The reasoning of the Eleventh Circuit in holding that an employer violates Title VII by creating or condoning a hostile work environment is instructive:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.

Henson v. City of Dundee, 682 F.2d at 902 (footnote omitted).

II. UNDER TITLE VII AN EMPLOYER IS LIABLE FOR SEXUAL HARASSMENT COMMITTED BY ITS SUPERVISORY PERSONNEL WITHOUT REGARD TO ITS ACTUAL KNOWLEDGE OF THE OFFENDING CONDUCT

A. Title VII Imposes Liability On An Employer For The Acts Of Its Supervisory Personnel

The language of Title VII is unambiguous in including the acts of an employer's agents within its scope. In relevant part, the statute provides that it is unlawful "for an *employer* . . . to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Employer is defined in the statute to include "any agent" of the employer. 42 U.S.C. § 2000e(b). Notwithstanding this statutory language, Petitioner argues that the Bank is not liable for the discriminatory acts of Taylor who was an assistant vice-president and manager of the branch where Vinson was employed and Vinson's immediate supervisor during the entire period she was employed by the Bank. The court of appeals noted that Taylor had the "ability to direct employees in their work, to evaluate their performances and to recommend personnel actions," and that such authority "carries [the] attendant power to coerce, intimidate and harass." *Vinson v. Taylor*, 753 F.2d 141, 150 (D.C. Cir. 1985). Given these facts, the court of appeals correctly concluded that Taylor was the agent of the Bank for purposes of liability under Title VII. *Id.*

The EEOC Guidelines are consistent with the language of the statute in holding employers liable for the conduct of their agents and supervisors:

> Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regard-

> less of whether the employer knew or should have known of their occurrence.

29 C.F.R. § 1604.11(c) (1985).

The Guidelines comport with well-established principles developed in Title VII cases involving harassment based on race, religion, and national origin. In those cases, employers consistently have been held liable for the discriminatory acts of supervisory personnel without regard to the employers' actual knowledge of the offending conduct. *See, e.g., Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384 (D. Minn. 1980); *Lucero v. Beth Israel Hospital and Geriatric Center*, 479 F. Supp. 452, 455 (D. Colo. 1979); *Calcote v. Texas Educational Foundation, Inc.*, 458 F. Supp. 231, 237 (W.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971).

The Bank is an entity which can only act through its agents. The acts of harassment were committed by one of those agents, Taylor, who was entrusted by the Bank with the authority to supervise the daily workings of one of its branches and to direct the activities of that branch's employees. Indeed, the court below found that Taylor, as the ranking bank officer in the branch, made written recommendations respecting salary increases, bonuses, and promotions for the employees under his supervision. *Vinson v. Taylor*, 753 F.2d at 150 n.70.

Petitioner argues that Taylor was not an "agent" of the Bank because he was purportedly acting contrary to Bank policy and in a manner that was of no benefit to the Bank. Petitioner's Brief at 20-21. The vicarious liability imposed in Title VII actions is not dependent upon whether the employer authorized or benefited from the specific unlawful employment

practice. *Horn v. Duke Homes*, 755 F.2d 599, 606 (7th Cir. 1985); *Restatement (Second) of Agency* § 228(1)(a)(c) (1958). Sexual harassment of an employee would seldom, if ever, benefit an employer. Therefore, such a requirement would emasculate Title VII by virtually immunizing employers from the consequences of their agents' actions.[7] Rather, employers must be liable for discriminatory conduct by supervisors it chooses to evaluate, hire, and fire employees and/or to supervise the work environment. This delegation of authority establishes the agency relationship that imputes the supervisor's unlawful employment practices to the employer. *See Horn v. Duke Homes*, 755 F.2d at 605 ("by delegating power to [the supervisor] the 'employer' and [the supervisor] essentially merged"); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979).

The imposition of Title VII liability on employers based on the discriminatory acts of their supervisory personnel does not place an unreasonable burden on employers. The statute does not authorize punitive or pain and suffering damages but limits remedies to correction of the improper employment practice through back pay, reinstatement, and injunction. Under Title VII, the EEOC must notify an employer of charges made against it within ten days after receipt of the complaint. 42 U.S.C. § 2000e-5(b). After an investigation by the EEOC, if the charges appear to be based on "reasonable cause," the EEOC then must attempt to eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Id.*

As the court recognized in *Miller*, "[a]n employer whose internal procedures would have redressed the alleged discrimination can avoid litigation by employing these procedures

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7 In the corporate context, the result of absolving the employer from liability for the acts of its supervisors and agents would be to leave employees who are victims of sexual harassment without a remedy under Title VII. The statute limits liability to "employers." If the supervisor is not an agent for purposes of employer liability, there is no basis in the statute for imposing individual liability on him.

to remedy the discrimination upon receiving notice of the complaint or during the conciliation period." *Miller v. Bank of America*, 600 F.2d at 214. At a minimum, this provides the employer with a means to avoid litigation at the same time that it allows the employee to secure an end to the harassment.

B. Title VII Does Not Require That An Employer Have Notice Or Actual Knowledge Of The Supervisor's Discriminatory Conduct

Notwithstanding the absence of a notice requirement in Title VII and the EEOC Guidelines, Petitioner urges that an employer cannot be liable for violations of Title VII by its agents unless it had actual notice of the offending conduct prior to commencement of an action to enforce the statute.[8] The court of appeals in its opinion below rejected this position and correctly held that "Title VII imposes upon an employer without specific notice of sexual harassment by supervisory personnel responsibility for that species of discrimination." *Vinson v. Taylor*, 753 F.2d 141, 147 (D.C. Cir. 1985).

The statutory scheme of Title VII shows that Congress did not intend to impose upon the employee the obligation to give her employer actual notice of the discriminatory conduct prior to commencing an action to enforce her rights. Title VII is replete with procedures covering the filing of a discrimination charge. 42 U.S.C. § 2000e-5(b)-(g). The statute details when and how the employer is to be notified and establishes preconditions to the EEOC's consideration of an employee's claim of discrimination. The only required notice is set forth in those procedures--the employee must file a charge with the EEOC and the EEOC must give notice to the employer. 42 U.S.C.

8 In this case, where both the Bank and the supervisor deny any improper conduct, the notice issue is a smokescreen designed to avoid liability and to deprive those who suffer sexual harassment of the full protection of Title VII. The Bank cannot seriously argue that the lack of notice deprived it of the opportunity to correct the conditions in a sexually discriminatory work environment when it simultaneously argues that the claimed harassment did not exist. The Bank's position merely indicates that a complaint by Vinson would have been futile.

§ 2000e-5(b). Nowhere does Title VII even suggest that an aggrieved employee must provide the employer with notice or that the employer must otherwise have actual knowledge of the offensive conduct before relief may be sought. The absence of a statutory notice provision manifests a clear Congressional intent that an employer is liable for its agents' Title VII violations even if it lacked notice of those violations. *See Fox v. Reich & Tang, Inc.*, 692 F.2d 250, 255 (2d Cir. 1982), *aff'd*, 464 U.S. 523 (1984) ("When Congress has provided specific and elaborate enforcement provisions, and entrusted their use to particular parties, [the court] will not lightly assume an unexpressed intention to create additional ones.").

This conclusion is buttressed by precedents from Title VII cases involving harassment based on race, religion, and national origin. Those cases have consistently rejected the position that an employer must have actual notice from the employee of the discriminatory acts of its supervisory personnel. *See, e.g., Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977); *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381 (D. Minn. 1980); *Lucero v. Beth Israel Hospital and Geriatric Center*, 479 F. Supp. 452 (D. Colo. 1979); *Calcote v. Texas Educational Foundation, Inc.*, 458 F. Supp. 231 (W.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971).[9]

9 Several *amici* urge that the employer must have actual knowledge or notice of the supervisor's misconduct in cases of sexual harassment because sexual harassment, unlike racial or ethnic harassment, is "not always intrinsically offensive," Brief of the Chamber of Commerce of the United States as *Amicus Curiae* at 15, or because there is no consensus of what constitutes sexual harassment, Brief of Trustees of Boston University as *Amicus Curiae* at 9. There is no question that sexual harassment can be and has been defined. *See EEOC Guidelines*, 29 C.F.R. § 1604.11(a) (1985). Once a court has determined that sexual harassment has occurred, it is no less intrinsically offensive than any other form of harassment barred by Title VII.

Moreover, at least three other circuits join the court of appeals in rejecting a notice requirement in Title VII cases involving sexual harassment. *Horn v. Duke Homes*, 755 F.2d at 604; *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 81 (3rd Cir. 1983); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979).

A notice requirement has no support in the statute, in cases involving the loss of tangible economic job benefits, or in cases involving harassment on any basis other than sex. Congress did not intend to impose different requirements for victims of sexual harassment. The creation of such a new rule in the area of sexual harassment would deprive those who suffer this form of discrimination the full protection and remedies of Title VII.

III. THE COURT OF APPEALS PROPERLY RULED EVIDENCE OF PLAINTIFF'S SEXUAL FANTASIES AND DRESS INADMISSIBLE

The court of appeals recognized that purely personal relationships that are not a product of employer coercion or intimidation do not constitute sexual harassment and are not actionable under Title VII. In determining whether a plaintiff has been subjected to sexual harassment, the proper focus is on whether defendant's sexual advances were persistent and "unwelcome" or whether both parties willingly engaged in a personal relationship. Evidence of a complainant's general character and conduct that is not directly related to the defendant-harasser or to the interaction between him and the plaintiff is not relevant to determining whether the parties willingly engaged in a personal relationship. Thus, the court of appeals properly ruled that evidence of Vinson's dress and her communication to female co-workers of a sexual fantasy was inadmissible to prove that she "welcomed" sexual advances by Taylor or voluntarily engaged in a sexual relationship with him. *Vinson v. Taylor*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985).

A. In Addressing The Question Of "Voluntariness," The Court Of Appeals Was Referring To Coerced Capitulation To Employer Demands Rather Than To A Consensual Relationship

The court of appeals recognized the distinction between coerced submission and a consensual personal relationship. It excluded consensual relationsnips from the definition of "harassment" and noted that the defendant's advances must be "unwelcome" to be actionable. *Vinson v. Taylor*, 753 F.2d 141, 150 n.68 (D.C. Cir. 1985). In examining the issue of "voluntariness," however, the court stated that "*[i]f . . . the evidence warranted a finding of sexual harassment by that standard* [unwelcome sexual advances interfering with work performance or creating a hostile work environment], Vinson's 'voluntar[iness]' had no materiality whatsoever." *Id.* at 146 (emphasis added).

The court used the term "voluntariness" to indicate capitulation to unwelcome demands for sex rather than a decision to engage in a consensual sexual relationship free from employment-related intimidation.[10] The court's meaning is reflected by its repeated use of quotation marks with the word "voluntary," which term it used interchangeably with "capitulation," "toleration," "acquiescence," "yield," and " 'voluntary' submission" in describing a plaintiff's reaction to harassment. *Id.*

The Petitioner and dissenters to the denial of rehearing *en banc* have ignored the pivotal first part of the court's statement and thus have misconstrued its meaning: If Vinson proved all the other elements of harassment--including that Taylor's conduct was unwelcome--her "voluntariness," that is, capitulation or submission to the offensive advances, was immaterial.

---

10 The Brief for the Trustees of Boston University as *Amicus Curiae* recognized that the court of appeals was discussing a plaintiff's capitulation to unwanted pressure rather than a consensual personal relationship. Br. at 19. *See also* Memorandum of EEOC Acting General Counsel, Johnny J. Butler, to EEOC Chairman and Commissioners, 210 D. Lab. Rep. E-2, at E-3 n.1 (October 30, 1985).

B. The Court Of Appeals Properly Excluded Evidence Of Plaintiff's General Conduct

The court correctly excluded evidence of Vinson's dress and sexual fantasy as proof that an advance was welcome. The dire warnings of the consequences of that ruling are overstated.[11] The ruling below does not deprive a defendant of an opportunity to prove that the plaintiff welcomed his advances and engaged in a mutual personal relationship. It simply recognizes that there are limits to the type of evidence that is relevant and admissible to a defense that the plaintiff willingly participated in the conduct about which she is complaining. In fact, nothing in the court of appeals' ruling would exclude relevant evidence of the relationship between Vinson and Taylor. The distinction between evidence of plaintiff's general conduct, which would be inadmissible, and her conduct toward or relating to the defendant, which would be admissible, comports with the Federal Rules of Evidence and permits a defendant to introduce evidence that a plaintiff welcomed his advances while protecting the plaintiff from an unjustified intrusion into her personal behavior.

Rules 401 and 402 of the Federal Rules of Evidence establish the basic admissibility test: evidence is relevant and therefore admissible if it tends to make the existence of any material fact more or less probable than it would be without the evidence. The testimony regarding Vinson's sexual fantasy and her dress was properly excluded because it was not relevant to whether Vinson welcomed Taylor's advances. That Vinson had a sexual fantasy which was neither about nor known to the defendant, or that she dressed in a particular manner, does not make it

11 It has been urged that the effect of ruling evidence of dress and sexual fantasies inadmissible is to "eliminat[e] any voluntariness defense," *Vinson v. Taylor*, 760 F.2d 1330, 1331 (D.C. Cir. 1985) (Bork, J., dissenting), "den[y] [the defendant] the right to prove that the 'victim' is not that but a willing participant," *id.* at 1330, or "refus[e] to allow any evidence of a plaintiff's own behavior," Brief for the Chamber of Commerce of the United States as *Amicus Curiae* at 20.

"more or less probable" that Vinson welcomed Taylor's sexual advances.

Admitting general character evidence would put the victim of sexual harassment on trial and discourage sexually-harassed women from pursuing legitimate claims under Title VII--a result contrary to the broad remedial purposes of the statute. Defendants in sexual harassment cases seek to introduce such evidence in order to imbue the factfinding process with the very stereotypical judgments about, and prejudice towards, females that Title VII seeks to eradicate.[12]

Congress has recognized that evidence of a victim's general conduct is prejudicial in rape cases. *See* Fed. R. Evid. 412. Evidence of Vinson's dress and a sexual fantasy concerning her deceased grandfather is no less prejudicial and was therefore properly excluded because its tendency to prejudice the trier of fact far outweighed any minimal relevance it may have had. Fed. R. Evid. 403; *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983). As the court in *Priest* recognized in denying a motion for discovery of a plaintiff's sexual history,

> sexual harassment plaintiffs would appear to require particular protection from this sort of intimidation and discouragement if the statutory cause of action for such claims is to have meaning. Without such protection from the courts, employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the "Catch 22" of invoking their statutory remedy only at the risk of enduring further intrusions into irrelevant details of their personal lives . . . .

Id. at 761.

12 The prejudicial use and effect of such evidence pervaded this case. In light of Taylor and Petitioner's defense at trial that no sexual relationship ever occurred (Petitioner's Brief at 3), it is particularly disingenuous for Petitioner to argue that this evidence of Vinson's conduct and attire indicates that she welcomed Taylor's advances and acquiesced in a sexual relationship.

As noted in *Priest*, Federal Rule of Evidence 412 precludes evidence of a rape victim's past sexual behavior except in certain limited circumstances.[13] Surely, if evidence of a victim's sexual history is inadmissible in a rape trial where the defendant is on trial for a serious felony, similar evidence should be excluded in a civil action for sexual harassment to which no Sixth Amendment rights attach. *Priest v. Rotary*, 98 F.R.D. at 762. Under any other rule, "many victims of harassment will be deterred from exercising their Title VII rights." Memorandum of EEOC Acting General Counsel, Johnny J. Butler, to EEOC Chairman and Commissioners, 210 D. Lab. Rep. at E-3.

The distinction between the admissibility of evidence of plaintiff's general conduct and conduct directed toward the defendant fully satisfies the defendant's right to introduce relevant evidence that the plaintiff did not find the conduct or atmosphere unwelcome or objectionable. It also fulfills the statutory purposes of Title VII by removing obstacles to justice for plaintiffs who would otherwise be deterred from exposing sexual harassment for fear of unwarranted intrusion into their personal lives.

13 Evidence concerning the plaintiff's past sexual history *only with the accused* is admissible on the issue of whether the plaintiff consented to the alleged sexual act. Rule 412(b)(2)(B). This Rule is consistent with the holding of the court of appeals that evidence of the plaintiff's conduct *with or toward the defendant* (or participating in creating the environment) is admissible, but evidence of the plaintiff's general conduct is inadmissible.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Dated: Washington, D.C.
February 11, 1986

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(10)

No. 84-1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERITOR SAVINGS BANK, FSB,

Petitioner,

—v.—

MECHELLE VINSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WORKING WOMEN'S INSTITUTE, *ET AL.* AS *AMICI CURIAE*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. SEXUAL HARASSMENT IS A PERVASIVE PRACTICE WHICH CIRCUMSCRIBES WOMEN'S EMPLOYMENT OPPORTUNITIES AND IMPAIRS THEIR HEALTH ...	8
A. Sexual Harassment Is Unwelcome Conduct ..	8
B. Sexual Harassment of Women Is Pervasive	14
C. Women Are Especially Vulnerable to Sexual Harassment	18
D. Sexual Harassment Impairs Women's Employment Opportunities and Harms Their Physical and Psychological Health	29

Page

II. SEXUAL HARASSEMENT OF A FEMALE SUPERVISOR BY A MALE SUPERVISOR VIOLATES TITLE VII 37

A. Sexual Harassment Is Prohibited by Title VII .37

B. Sexual Harassment Violates Title VII Regardless of Whether the Victim Loses a Tangible job Benefit .. 46

C. The Court of Appeals Correctly Remanded this Case 60

CONCLUSION 64

APPENDIX

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 42

Anderson v. City of Albuquerque, 690 F.2d 796 (10th Cir. 1982) 61

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) 38-39

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) passim

Califano v. Westcott, 443 U.S. 76 (1979) 57

Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977) 55

Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982) 32,35,51

Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) 15

Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984) 31,37,47,51

EEOC v. Sage Realty Co., 507 F. Supp. 599 (S.D.N.Y. 1981) 22

	Page
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Henson v. City of Dendee, 682 F.2d 897 (11th Cir. 1982)	38,47,50
Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985)	13,15,30-31,37
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	passim
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	Page
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McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984)	22
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Morgan v. Hertz, 542 F. Supp. 123 (W.D. Tenn. 1981), aff'd, sub nom., Jones-Morgan v. Hertz Corp., 725 F.2d 1070 (6th Cir. 1984)	45
Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984)	61
Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977)	26

	Page
Murry v. American Standard, Inc., 373 F. Supp. 716 (E.D. La.), aff'd, 488 F.2d 529 (5th Cir. 1973)	57-58
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Pullman-Standard v. Swint, 456 U.S. 273 (1982)	61
Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381 (5th Cir. 1983)	62
Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1982)	15
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Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977)	38

	Page
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Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982)	49
Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982)	49,57
Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984)	35,49
Woerner v. Brzeczek, 519 F. Supp. 517 (N.D. Ill. 1981)	16
Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975)	55
Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wisc. 1984)	12-13,16, 35,58
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	Page
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29 C.F.R. §1604.11 (1985)	passim
Legislative Materials:	
110 Cong. Rec. 2577 (1964)	40
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	Page
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	Page
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	Page
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-1979

Meritor Savings Bank, FSB,

Petitioner,

-against-

Mechelle Vinson,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE OF WORKING WOMEN'S INSTITUTE, ET AL.

Amici Working Women's Institute et al. respectfully submit this brief amici curiae on behalf of respondent Mechelle Vinson. The parties' written consents to file this brief have been filed with the Clerk of the Court.

Statement of Interest

This case presents the question of when the sexual harassment of a female subordinate by a male supervisor in the workplace constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et seq.

Amici are profoundly concerned by sexual harassment, because it is a pervasive and insidious form of sex discrimination which restricts the employment opportunities of millions of American women.[1/] Amici file this Brief specifically to address the issue of whether sexual harassment constitutes sex discrimination under Title VII. As a result of their extensive counseling of victims of sexual

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1/ Descriptions of each of the fourteen amici are set forth in the Appendix attached hereto.

harassment in employment, their research into the sociological patterns of the problem, and their involvement in the developing law in this area, Amici believe their brief will elucidate the role that sexual harassment plays in restricting women's opportunities for equality in employment.

Statement of the Case

Mechelle Vinson filed this action on September 22, 1978, alleging that she was a victim of sex discrimination in the form of sexual harassment. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. 37, 39 (BNA) (D.D.C. 1980). Specifically, she alleged that she was sexually harassed by her immediate supervisor, Sidney Taylor, the Branch Manager of the Northeast Branch of the Capital City Federal Savings and Loan Association (the "Bank"). Id. at 38.

Vinson was hired by Taylor on or about September 9, 1974. At a bench trial, Vinson testified that Taylor made sexual advances and that she initially declined but ultimately submitted for fear of losing her job. Id. She testified that he forced her to engage in sexual relations with him at the Bank during and after banking hours and harassed her at work in other ways, including fondling her breasts and buttocks and exposing himself. Id. She said that she never reported Taylor's harassment because she was afraid of him. Id. at 39.

Taylor testified that he never made any advances to Vinson, never fondled her, never made suggestive remarks to her and never engaged in a sexual relationship with her. Id.

The District Court made no finding as to whether Taylor had engaged in the

sexually harassing acts. It found that Vinson's promotions were based on merit alone and that her raises, bonuses and promotions were not determined by Taylor, who only made written recommendations. Id. at 42-43. It further found that if Vinson had had any sexual relationship with Taylor, it was voluntary and had nothing to do with her continued employment at the Bank or her advancement. Id. at 42. The District Court concluded that Vinson was not the victim of sexual harassment or sex discrimination and dismissed her Title VII claims. Id. at 43.

On appeal, the United States Circuit Court for the District of Columbia found that Vinson's claim was for pervasive on-the-job sexual harassment by her supervisor and not for the denial of a tangible job benefit, and that the District Court had not determined whether such a

violation had occurred. Vinson v. Taylor, 753 F.2d 141, 145 (D.C. Cir. 1985). The Court therefore remanded the case for reconsideration in light of the decision in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), which held that sexual harassment violated Title VII regardless of whether the employee was denied a tangible job benefit. 753 F.2d at 145.

Summary of Argument

Amici file this brief to address the issue of whether allegations, that a supervisory male employee made unwelcome sexual advances to a subordinate female employee without any loss of tangible job benefits, state a claim for discrimination in employment because of sex in violation of Title VII.2/

2/ This Court granted certiorari on three issues. 54 U.S.L.W. 3191 (Oct. 8, 1985). The other two issues are the extent of employer liability for sexual harassment (footnote continued)

In Part I, we describe the nature and extent of sexual harassment, and its detrimental effects. We demonstrate that sexual harassment is a pervasive practice which circumscribes women's employment opportunities and harms their physical and psychological well-being.

In Part II, we demonstrate that sexual harassment is prohibited by Title VII, whether or not it results in the denial of a tangible job benefit, and that the Court of Appeals correctly remanded the case in light of the applicable legal standards for sexual harassment set forth in its decision in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

(footnote continued from previous page) and the standards for the admissibility of evidence to refute allegations of sexual harassment. Id. Amici Women's Legal Defense Fund, et al. address those issues in their brief.

ARGUMENT

I. Sexual Harassment Is a Pervasive Practice Which Circumscribes Women's Employment Opportunities and Impairs Their Health

A. Sexual Harassment Is Unwelcome Conduct

The term "sexual harassment" encompasses a broad range of unwelcome acts that focus on women's[3] sexuality, rather than on their contributions as employees.[4] These acts may be visual (leering and ogling), verbal (derogatory remarks, innuendos and jokes) or physical (pinching, fondling and rape). Sexual harassment also includes requests for sexual relations coupled with explicit or implicit threats of adverse job consequences if the woman refuses. The Equal Employment Opportunity Commission ("EEOC") Guidelines define sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a) (1985).

Sexual harassment thus spans the gamut from subtle psychological coercion to gross physical abuse.

In its brief, the Bank argues that "[s]exual activity . . . may well be so-

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3/ Amici believe that sexual harassment of men violates Title VII, but our principal concern in this Brief is sexual harassment of women.

4/ Sexual harassment also includes harassment, not sexual in nature, that would not occur but for the sex of the employee. McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

cially acceptable and wholly unrelated to the job."5/ At issue here is not "sexual activity" but sexual harassment. By definition, sexual harassment is unwelcome sexual attention and therefore excludes sexual attention that is welcome and not intimidating or coercive in any way. There is widespread agreement as to what constitutes sexual harassment.6/ Pressure for sexual relations, sexual letters and calls, and deliberate touching were widely recognized as sexual harassment, whether or not the harasser was a supervisor, in a survey of federal employees.7/ The majority of respondents to that study also thought that suggestive looks and sexual remarks from a supervisor were sexually harassing, and the majority of the female respondents considered such conduct sexually harassing regardless of the harasser's rank. U.S. Merit Study, supra n.7, at 27.

The vast majority of women find unwelcome sexual attention humiliating, de-

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5/ Brief of Petitioner Meritor Savings Bank, FSB, dated Dec. 11, 1985 (hereinafter "Bank Br."), at 10.

6/ A 1981 survey of executives by the Harvard Business Review in conjunction with Redbook Magazine (hereinafter "Harvard Study") came to the above conclusion. Collins & Blodgett, Sexual harassment ... some see it ... some won't ..., 59 Harv. Bus. Rev. 76, 78 (1981) (hereinafter "Collins"). See also Safran, Sexual Harassment: The View from the Top, 156 Redbook 46 (Mar. 1981) (hereinafter "Safran").

7/ Sexual Harassment in the Federal Workplace, Report of the U.S. Merit Systems Protection Board 26-27 (1981) (hereinafter "U.S. Merit Study"). In March 1981, the Merit System Protection Board presented a report on a survey on sexual harassment in the federal workplace. Over 20,000 federal employees had completed the survey, making it the largest and most comprehensive study to date. Id. at iii, v. The majority of respondents who had also worked outside the federal government believed that sexual harassment was no worse in the federal workplace than in the private sector or state and local governments. Id. at 39.

meaning, and intimidating.8/ The federal employees surveyed almost unanimously agreed that unwanted sexual attention on the job is something employees should not have to tolerate. U.S. Merit Study, supra n.7, at 29.

Sexual harassment is usually not an isolated incident. The U.S. Merit Study found that most incidents were repeated, and lasted for a week or more, and many lasted more than six months.9/ See, e.g., Zabkowicz v. West Bend Co., 589

8/ Safran, What Men Do To Women On The Job, 148 Redbook 149, 217 (Nov. 1976) (hereinafter "Redbook Study"). The Redbook Study, which surveyed 9,000 women, was the first major survey of sexual harassment.

9/ U.S. Merit Study, supra n.7, at 38-39. Even a single incident, if severe enough to have work-related repercussions, may constitute sexual harassment. For example, rape is sexual harassment, and actual or attempted rape is the one form of sexual harassment that commonly occurs only once. Id. at 38.

F. Supp. 780, 785 (E.D. Wisc. 1984) (harassment lasted more than three years).

Sexual harassment may affect one woman, several women or all the women in a particular workplace, but frequently more than one woman is harassed.10/ See, e.g. Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1532 (11th Cir. 1983); Bundy, 641 F.2d at 940, n.3; Horn v. Duke Homes, 755 F.2d 599, 602 (7th Cir. 1985). That a harasser often bothers more than one particular woman negates the view that sexual harassment is mainly a matter of sexual attraction to a specific person and instead demonstrates that it is gender-related. U.S. Merit Study, supra n.7, at 10.

10/ The U.S. Merit Study, supra n.7, at 60, found that 43% of the female victims reported that their harassers had bothered others (53% did not know), and often the harassers responsible for the more severe harassment were repeat offenders.

B. Sexual Harassment of Women Is Pervasive

Sexual harassment is the most widespread problem women face in the workforce.[11] Studies have found that from forty to ninety percent of American women have experienced one or more forms of unwanted sexual attention on the job.[12]

11/ Sex Discrimination in the Workplace: Hearings Before the Senate Labor and Human Resources Comm., 97th Cong., 1st Sess., 518 (1981) (hereinafter "Senate Hearings") (Statement of Karen Sauvigne and Joan Vermeulen of Working Women's Institute).

12/ An early study found that 88% of the respondents had experienced sexual harassment. Redbook Study, supra n.8 , at 219. The U.S. Merit Study, supra n.7, at 5, found that 42% of female federal employees had experienced sexual harassment in the past two years. Most recently, a study of the Eastern Region of the Federal Aviation Administration (FAA), performed under contract to the FAA, found that 40% of the female employees had experienced sexual harassment and 66% had experienced either gender bias or sexual harassment. Working Women's Institute, Results of a Survey on Gender Bias and Sexual Harassment in the FAA Eastern Region, 7, Addendum at 1 (August 1985) (hereinafter "FAA Study").

Women are subject to sexual harassment regardless of their age,[13] e.g., Horn, 755 F.2d at 601 (47 years old); Robson v. Eva's Super Market, Inc., 538 F. Supp. 857, 859 (N.D. Ohio 1982) (19 years old) or their marital status,[14] e.g., Phillips, 711 F.2d at 1527 (married); whether they are blue collar workers, e.g., Craig v. Y & Y Snacks, Inc. 721 F.2d 77, 78 (3d Cir. 1983) (assembly-line worker), clerical workers, Stewart v. Thomas, 538 F. Supp. 891, 893 (D.D.C. 1982) (legal clerk), or professionals, e.g., Kyriazi v. Western Electric Co., 461 F. Supp.

13/ One study found that victims ranged in age from 16 to 65. Crull, The Impact of Sexual Harassment on the Job in Sexuality in Organizations 67 (1980) (hereinafter "Crull").

14/ Frequently, sexual harassment of a single employee continues or even intensifies after she marries. See, e.g., Mays v. Williamson and Sons, 591 F. Supp. 1518, 1520 (E.D. Ark. 1984), aff'd, 775 F.2d 258 (8th Cir. 1985).

894, 899 (D. N.J. 1978) (engineer). See also Woerner v. Brzeczek, 519 F. Supp. 517, 518 (N.D. Ill. 1981) (police officer). Even pregnant women have been sexually harassed, e.g., Zabkowicz, 589 F. Supp. at 784. Thus, any woman may be a target of sexual harassment.

The most common form of sexual harassment is verbal, including repeated comments about a women's body, sexual jokes, sexual innuendos and sexual propositions. FAA Study, supra n.12, at 7. One study found that a third of the female employees had been subjected to sexual remarks, a quarter had been deliberately touched, fifteen percent had been pressured for dates, nine percent had been pressured for sexual relations, and

one percent had been subjected to actual or attempted rape or assault.15/

Sexual harassment is not a recent phenomenon. Women have been sexually harassed as long as they have been employed outside the home.16/ With the advent of the industrial revolution, vast numbers of women went to work in factories and discovered rampant sexual harassment.17/ Sexual harassment, then as now, went hand in hand with other forms of discrimina-

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15/ U.S. Merit Study, supra n.7, at 37. Applying these figures to the entire federal workforce, aproximately 9,000 female federal employees were the victims of actual or attempted rape or assault over a two-year period. Id. at 35.

16/ When Louisa May Alcott, later author of Little Women, went to work as a domestic servant at the age of eighteen, her employer harassed her and when she rebuffed his advances, he retaliated by giving her more difficult work until she quit. Alcott, How I Went Out To Service, 26 The Independent (June 4, 1874).

17/ Farley, Sexual Shakedown 34-36 (1978) (hereinafter "Farley").

tion against women, but the extent to which sexual harassment circumscribes women's employment opportunities has been understood only recently. Farley, supra, n.17 at 12.

C. Women Are Especially Vulnerable to Sexual Harassment

Although sexual harassment is not, by definition, limited to women, women are substantially more likely to be sexually harassed than men.[18] This is because women are more vulnerable to sexual harassment due to their lower status in the workforce hierarchy. Women are concentrated in low echelon, low-paying jobs, primarily in the clerical and service areas.[19] In these traditionally female occupations, women are usually subordinate to male supervisors,[20] and their raises and opportunities for advancement often depend on the goodwill of their supervisors, and not on their job performance. Kanter, Men and Women of the Corporation 77 (1977).

Women who enter predominately male occupations, which almost invariably have higher wages than traditionally female jobs, are often greeted with hostility and resentment.[21] Through sexual

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18/ The U.S. Merit Study, supra n.7, at 36, found that women were three times more likely to be sexually harassed than men (42% of the female employees compared to 15% of the male employees). Applying these figures to the entire federal workforce, approximately 294,000 women and 168,000 men were harassed over a two year period. Id. See also FAA Study, supra n.12, Addendum at 5, 9.

19/ Women's Bureau, U.S. Dep't of Labor, Time of Change: 1983 Handbook on Women Workers 51, 92 (1983) (hereinafter "Time of Change").

20/ For example, women are 80.5% of the clerical workers whereas men are 72.5% of the managers and administrators. Time of Change, supra, n.19, at 58-59.

21/ Wider Opportunities for Women, A Territorial Issue: A Study of Women in the Construction Trades 39-40 (1982); Crull & Cohen, Expanding the Sexual Def-
(footnote continued)

harassment, male co-workers and supervisors try to show that women do not belong in what had previously been an all-male "club." Gruber, supra n.21, at 272; Cohen, supra n.21, at 143. Accordingly, women in predominately male positions are more likely to be sexually harassed than those in traditionally female positions. U.S. Merit Study, supra n.7, at 6, 8, 54; FAA Study, supra n.12, at 12, 51.

The hierarchical structure of the workplace often puts men in postions of power vis-a-vis women. The supervisor's role affords him tremendous opportunity for exerting undue influence on subordinates. Thus, the Harvard Study reported

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inition of Harassment, Occupational Health Nursing 141, 143 (Mar. 1984) (hereinafter "Cohen"); Gruber & Bjorn, Blue Collar Blues: The Sexual Harassment of Women Auto Workers, 9 Work & Occupations 271, 272 (August 1982) (hereinafter "Gruber").

that because of the supervisor's power, the same behavior is more threatening and serious when the harasser is a supervisor rather than a co-worker. Collins, supra n.6, at 80. See also U.S. Merit Study, supra n.7, at 4. Women who were harassed by supervisors are also more likely to foresee and suffer negative consequences for refusing to submit than those harassed by co-workers or other employees. U.S. Merit Study, supra n.7, at 11; Cohen, supra n.21, at 144.

Moreover, because of his authority, the supervisor is responsible for the tone of the working environment. U.S. Merit Study, supra n.7, at 61. Frequently, supervisors who are aware of sexual harassment treat it as insignificant or tacitly encourage it.22/ Whatever his

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22/ Supervisors may be more likely to tolerate sexual harassment of subordi-
(footnote continued)

authority to make final decisions as to promotion or dismissal,23/ the supervisor is in the most immediate position to assign and evaluate work and therefore has the ability to make an employee's life intolerable.24/

Women are also vulnerable to sexual harassment because of their economic po-

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(footnote continued from previous page) nates of the opposite sex. U.S. Merit Study, supra n.7, at 51; Cohen, supra n.21, at 142.

23/ Even where a supervisor does not have final authority to make promotions or dismissals, his influence on an employee's future through his recommendations may be absolute absent objective standards for promotion or evaluation. Vermeulen, Employer Liability under Title VII for Sexual Harassment By Supervising Employees, 10 Cap. U.L. Rev. 499, 506 (1981).

24/ Co-workers, subordinates, and customers may also sexually harass women in violation of Title VII if they create job-related reprisals or intolerable working conditions. See McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984); EEOC v. Sage Realty Co., 507 F. Supp. 599 (S.D.N.Y. 1981).

sition. Due to the historical sex segregation of the workforce and the exclusion of women from higher-paying positions, women earn 63¢ for each $1.00 earned by men.25/ Women work for the same reasons men work, to support their families,26/ but have to make do with substantially lower wages.

The economic vulnerability of sexually harassed women is confirmed by extensive sociological research which has

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25/ Women's Bureau, U.S. Dep't of Labor, 20 Facts on Women Workers 3 (1984) (hereinafter "20 Facts").

26/ In 1984, two-thirds of the women in the civilian labor force were either single (26%), divorced (11%), widowed (5%), separated (4%), or had husbands whose incomes were less than $15,000 (19%). 20 Facts, supra n.25, at 2. In 1984, women maintained more than ten million families with children, 17% of all such families. Id. at 4. Married women who worked full-time contributed 38% of the family income on average, and 69% where the family income was under $10,000. Time of Change, supra n.19, at 19

found that most victims of sexual harassment are very dependent on their jobs.[27] For example, in Phillips, 711 F.2d at 1532, the employer tried to use his knowledge of the plaintiff's economic vulnerability to persuade her to perform sexual acts and when she refused and was fired, her family lost their house.

Black women and women who are members of other minority groups are especially vulnerable to sexual harassment, due largely to their inferior economic position.[28] Black women may also be more vulnerable because of their unique place

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27/ U.S. Merit Study, supra n.7, at 46. 69% of the female victims reported that they needed their jobs "a great deal." Id. at D-27. See also, Crull, supra n.13, at 67-68.

28/ Black women, often the sole support of their families, have a lower median salary than white women and men of any race. 20 Facts, supra n.5, at 3, 4.

in American history.[29] One unfortunate legacy of slavery, where black women were considered the property of white men and were sexually exploited, is the stereotype of black women as sexually available, sexually promiscuous, and unprotected by black men.[30]

Sociological research confirms that black and other minority women are more vulnerable to sexual harassment.[31] The

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29/ Ellis, Sexual Harassment and Race 8 J. Legis. 30, 39 (1981) (hereinafter "Ellis").

30/ Ellis, supra n.29, at 40. As in the present case, black women are also harassed by black men in part because attitudes toward black women in the culture as a whole have been shaped by those of the dominant group, white men. Id. at n.46. The fact that other members of the protected group join in the harassment does not make the harassment any less illegal. See EEOC Decision No. CL 68-12-431 EU, 2 Fair Empl. Prac. Cas (BNA) 295 (1971).

31/ There are frequently racial overtones to the sexual harassment of black women. Ellis, supra n.29, at 33. For example,
(footnote continued)

FAA Study, supra n.12, at 48, found that Black, Hispanic, and other minority women suffer more sexual harassment than white women. A study of sexual harassment in the automobile industry found that black women not only were harassed more frequently than white women, but also were harassed more severely. Gruber, supra n.21, at 284-85. See also, Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977). See generally, When the Boss Wants Sex, Essence, 82 (Mar. 1981).

Women are also vulnerable to sexual harassment because of their socialization. In American society, men are usually the initiators of purely social in-

(footnote continued from previous page) in Miller v. Bank of America, 600 F.2d 211, 212 (9th Cir. 1979), a black woman alleged that she was fired because she refused her supervisor's demand for sexual favors from a "black chick."

teraction and women the recipients.32/ That men, rather than women, generally initiate sexual relationships ensures that women bear the brunt of job-related advances.

Thus, women's socialization to sexual passivity combined with their economic subservience leaves many women, like Vinson, without any sense that they have options for stopping the harassment. Many women initially respond to sexual harassment by ignoring it, but this tactic usually does not work.33/ The overwhelming majority feel helpless when con-

32/ Crull, The Stress Effects of Sexual Harassment on the Job, 52 Am. J. Orthopsychiatry 539, 542 (1982) (hereinafter "Stress Study"). Taub, Keeping Women in Their Place: Sex Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C.L. Rev. 345, 367 (1980).

33/ One study found that 61% of the women ignored the behavior, and that this was one of the least effective responses. U.S. Merit Study, supra n.7, at 67. See also Redbook Study, supra n.8, at 218.

fronted with sexual harassment.[34] Redbook Study, supra n.8, at 218. They are afraid that if they complain they will be blamed or told that the problem is trivial.[35] Only one in four expect that if they complain, the harasser would be asked to stop. Redbook Study, supra n.8, at 218. These expectations conform with reality. One study found that half of the women who complained found their protest had no effect or aggravated the harassment. U.S. Merit Study, supra n.7, at 11.

The cases confirm that complaining about sexual harassment is often futile and may even worsen the problem. See, e.g., Bundy, 641 F.2d at 940 (when plain-

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34/ Many victims are unaware of any formal remedies. U.S. Merit Study, supra n.7, at 88.

35/ Renick, Sexual Harassment at Work, Personnel J., 658, 660 (1980) (hereinafter "Renick").

tiff, who was harassed by her supervisors, complained to their superior, he told her "that any man in his right mind would want to rape you" and asked her to begin a sexual relationship with him). See also Katz v. Dole, 709 F.2d 251, 253-54 (4th Cir. 1983). The perception that a harasser who is, like Taylor, in a supervisory position will not be prevented by the employer from abusing his authority to extract sexual favors can lead a victim, like Vinson, to submit for fear of losing her job.

D. Sexual Harassment Impairs Women's Employment Opportunities and Harms Their Physical and Psychological Health

Sexual harassment is a substantial barrier to equal employment opportunity for women. Many women lose their jobs and their livelihood when they refuse to accede to sexual advances, and many oth-

ers resign rather than remain in workplaces rendered intolerable by sexual harassment. A recent study of sexually harassed women found that more than a quarter had been fired and another quarter had resigned because of sexual harassment.36/ The U.S. Merit Study, supra n.7, at 76, estimated that 24,660 female federal employees, left their jobs because of sexual harassment over the two year study period. See, e.g., Mays v. Williamson & Sons, 775 F.2d 258 (8th Cir. 1985) (janitor fired after she refused supervisor's sexual advances and filing complaint of sex discrimination with the EEOC); Horn, 755 F.2d at 599 (factory worker fired after refusing to respond to

36/ Stress Study, supra n.32, at 541, Senator Paula Hawkins quit her first secretarial job, because, in her words, "the boss continued to pinch me and I did not like it." Senate Hearings, supra n.11, at 8.

sexual advances by her supervisor); Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984) (woman constructively discharged by employer's tolerance of sexually harassing conduct).

Women who are fired or resign in the face of persistent sexual harassment not only lose their jobs, but, because of their job turnover, they are frequently relegated to low paying jobs at the bottom of the seniority ladder. Farley, supra n.17, at 23-25. Thus, sexual harassment is a significant reason why women as a class have a shorter tenure on the job which, in turn, substantially contributes to the wage gap between men and women.37/

37/ According to the U.S. Dep't of Labor, 12% of the wage gap between white men and white women is attributable to the difference in length of employment with the present employer and 10% is attributable to years of training completed on the
(footnote continued)

Many women suffer other adverse job consequences because of sexual harassment, including negative job evaluations, poor recommendations, denial of overtime, demotions, reassignments to less desirable shifts, hours or locations, loss of job training and being subjected to impossible performance standards. Stress Study, supra n.32, at 540-41.

Since one sure way to avoid sexual harassment is not to come to work, sexual harassment contributes to absenteeism. One study found that twenty-one percent of the victims said it affected their attendance at work. FAA Study, supra n.11, at 13. See, e.g., Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 647 (E.D. Mich. 1982) (female employee was so frightened by supervisor's threat that if

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(footnote continued from previous page) present job. Time of Change, supra n.19, at 90.

she did not "do something nice for him" he would "start to get mean," that she did not report for work).

Furthermore, sexual harassment affects women's job performance. Many women subjected to persistent sexual harassment find it difficult to concentrate on their work and often devote time and energy that could be devoted to their duties to avoiding their harassers. Stress Study, supra n.12, at 541. Moreover, an employee's self-esteem and her ability to perform her job successfully are undermined when supervisors, co-workers and subordinates view her as a sexual object rather than a worker. Id. In one study, seventy-five percent of sexually harassed women conceded that their job performance had suffered. Id. The FAA Study, supra n.12, at 13, found that nearly one-third of women who were sexually harassed re-

ported that the quality of their work suffered and nearly one-fifth found that the quantity of work they did declined.

Moreover, sexual harassment harms women's physical and mental health. One study found that nearly a quarter of sexually harassed women said that their experience affected their physical condition, and seventy percent said it affected their emotional condition. Id. at 13. Another study of sexually harassed women found that ninety percent reported psychological stress, including nervousness, fear and anger, as many as sixty percent suffered from physical symptoms, including headaches, nausea and exhaustion, and twelve percent sought therapeutic help.38/ Stress Study, supra n.32, at

38/ In at least one reported case, sexual harassment caused a female employee to contemplate suicide. Phillips, 711 F.2d at 1528.

541. See also Cohen, supra n.21, at 145; Renick, supra n.35, at 660. See Zabkowicz, 589 F. Supp. at 783 (harassment caused "psychophysiological gastro intestinal disease," including diarrhea, vomiting and nausea); Coley, 561 F. Supp. at 648 (female employee was seriously psychologically affected by sexual harassment). See also Weiss v. United States, 595 F. Supp. 1050, 1055 (E.D. Va. 1984). Here Vinson testified that, as a result of Taylor's harassment, she suffered extreme physical and emotional stress which manifested itself in insomnia, nervousness and hair loss.39/

Faced with threats of losing their economic livelihood, some women, like Mechelle Vinson, may accede to sexual ad-

39/ Testimony of M. Vinson, Tr. Jan. 23, 1980, at 51.

vances[40]/ they find repellent or would otherwise reject.[41]/ In such cases, the stress effects on the harassed woman are compounded. Moreover, the message to other women in the workplace is that their value is not in their job performance but in their use as sexual objects.[42]/ Sexual harassment thus harms not only its direct object but also her colleagues.

40/ An unofficial poll of employees of the U.S. Department of Housing and Urban Development ("HUD") found that three out of ten sexually harassed women submitted to the sexual demands. Sexual Harassment Rampant at HUD, 7 Impact 1, 1 (July/Aug. 1979).

41/ In many cases, the sexual harasser is not someone the victim would choose as a partner. Redbook Study, supra n.8, at 217. Often, as here, the harasser is married. U.S. Merit Study, supra n.8, at 58.

42/ One study found that more than 90% of employees think that morale at work suffers when some employees appear to be ahead because of their sexuality. U.S. Merit Study, supra n.7, at 29.

II. Sexual Harassment of a Female Subordinate by a Male Supervisor Violates Title VII

A. Sexual Harassment Is Prohibited by Title VII

The District Court, the Court of Appeals below, and every other Court of Appeals which has considered the question has held that sexual harassment constitutes sex discrimination under Title VII.[43]/ Vinson, 23 Fair Empl. Prac. Cas. at 43, 753 F.2d at 147-48; Mays v. Williamson & Sons, 775 F.2d 258, 260 (8th Cir. 1985); Horn v. Duke Homes, 755 F.2d 599, 603-05 (7th Cir. 1983); Easter v. Jeep Corp., 750 F.2d 520, 523 (6th Cir. 1984); Simmons v. Lyons, 746 F.2d 265, 269-70 (5th Cir. 1984); Katz v. Dole, 709

43/ Title VII, 42 U.S.C. § 2000e-2(a)(1), provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with regard to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ."

F.2d 251, 256 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 901-02 (11th Cir. 1982); Miller v. Bank of America, 600 F.2d 211, 222 (9th Cir. 1979); Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044, 1046 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983, 995 (D.C. Cir. 1977).

In Barnes, where the plaintiff alleged that her job was abolished because she repulsed her male supervisor's advances, the court found that she had stated a prima facie case of sex discrimination under the plain language of Title VII. The court said:

> It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job.

* * *

> But for her womanhood, from aught that appears, [Barnes'] participation in sexual activity would never have been solicited . . . she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. 561 F.2d at 989-90.

Thus, the courts have recognized that sexual harassment is discrimination because of sex in violation of Title VII.44/

44/ In a footnote in his dissent from the denial of rehearing below, Vinson, 760 F.2d at 1337, n.7, Judge Bork, who did not contend that Barnes and Bundy should be overruled, suggested that it was analytically "awkward" to classify sexual harassment as sex discrimination because the Circuit Court, in dicta, had theorized that in the case of a bisexual harasser, which it termed a "reductio ad absurdum," the harassment might not amount to sex discrimination. See Bundy, 641 F.2d at 942, n.7. Amici believe that sexual harassment violates Title VII regardless of the harasser's sexual orientation, but, in any event, the issue of a hypothetical bisexual harasser is irrelevant here since Taylor's defense was that he did not harass Vinson, not that he sexually harassed both men and women.

The legislative history of the inclusion of sex as a form of employment discrimination prohibited by Title VII is notable for its brevity. The amendment adding sex was passed with minimal debate only two days before the bill passed the House of Representatives.45/ However, the legislative history of the Equal Employment Opportunity Act of 1972, which amended Title VII, makes clear the Congressional intent to treat sex discrimination with the same gravity as the other forms of discrimination prohibited by Title VII. The House Committee on Labor and Public Welfare stated:

> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of

45/ 110 Cong. Rec. 2577 (1964); Note, Sexual Harassment in the Workplace, 6 J. Corp. L. 625, 628 (1981).

> social concern given to any type of unlawful discrimination.46/

More recently, when Congress became aware of the extent to which sexual harassment restricts women's access to equal employment opportunities, the Subcommittee on Investigations of the Committee on Post Office and Civil Service (hereinafter the "Subcommittee") commissioned the U.S. Merit Study,47/ discussed extensively in Part I, supra, and entered into a Memorandum of Understanding with the EEOC requiring, among other things, that "[t]he Commission will issue a directive

46/ H. Rep. No. 92-238, 92nd Cong., 1st Sess. 5 (1971), reprinted in 2 U.S. Code & Admin. News 2137, 2141 (1972). See also S. Rep. 92-415, 92nd Cong., 1st Sess. 7-8 (1971).

47/ The Subcommittee was prompted to investigate sexual harassment by an unofficial survey which reported sexual harassment of HUD employees. Subcom. on Investigations of the House Comm. on Post Office and Civil Service, Press Release, (Sept. 19, 1979).

defining sexual harassment prohibited by Title VII of the Civil Rights Act." U.S. Merit Study, supra n. 7, at iii, E-6.

Subsequently, in accordance with the Congressional directive and the most recent court decisions, the EEOC promulgated guidelines providing that harassment on the basis of sex is a violation of Title VII. 29 C.F.R. § 1604.11(a) (1985). This Court has held that, as administrative interpretations of the Civil Rights Act by the enforcing agency, EEOC guidelines are to be given "great deference," Albemarle Paper Co. v. Moody, 422 U.S 405, 431 (1975) (citing Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971)), particularly where, as here, the guidelines are consistent with past interpretations of Title VII by the EEOC. See Nashville Gas Co. v. Satty, 434 U.S.

136, 142-143 n.4 (1977). See discussion, infra, p. 48.

Upon receiving the results of the U.S. Merit Study, the Subcommittee determined that sexual harassment was a widespread working condition throughout the federal government and recommended that the EEOC continue its efforts "to ensure that Federal employees are aware that sexual harassment in the workplace is prohibited under Title VII."48/ Subsequently, the Senate Committee on Labor and Human Resources held hearings which examined the Guidelines.49/

48/ Subcomm. on Investigations of the House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess., Sexual Harassment in the Federal Government 25 (Comm. Print 1980). The Subcommittee noted that private firms could address sexual harassment through existing equal opportunity programs. Id. at 27.

49/ Senate Hearings, supra, n.11, at 1, 333. Senator Hatch said, "It is anathema to everything we stand for as a Nation

(footnote continued)

Congress thus is fully aware of the EEOC's application of Title VII to sexual harassment and has heartily endorsed it. That Congress prompted and endorsed the EEOC Guidelines provides further support for giving the EEOC Guidelines "great deference." See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 76 (1977).

Most recently, the EEOC and the United States, in their amici curiae brief on this appeal, agreed that sexual harassment violates Title VII.[50/]

That sexual harassment of women is simply one aspect of discrimination against women is borne out by the numerous cases in which sexual harassment went

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(footnote continued from previous page) that some women are subjected to various forms of sexual harassment to obtain, keep or advance in their jobs." Id. at 1.

50/ Amici Curiae Brief of the United States et. al, dated December 1985, at (hereinafter "EEOC Brief").

hand in hand with other forms of sexual discrimination. See Kyriazi, 461 F. Supp. at 949 (in addition to holding that Western Electric Company had illegally tolerated sexual harassment, the court found that it had discriminated against women in hiring, promotions, training and discharges). See also Held v. Gulf Oil Corp., 684 F.2d 427, 432 (6th Cir. 1982); Morgan v. Hertz, 542 F. Supp. 123 (W.D. Tenn. 1981), aff'd, sub nom Sones-Morgan v. Hertz Corp., 725 F.2d 1070 (6th Cir. 1984). As one study noted, "It is a fact of working life that the man who sees women as 'office decoration' or 'fair game' is not likely to see them sitting on boards of directors." Redbook Study, supra n.8, at 217.

B. Sexual Harassment Violates Title VII Regardless of Whether the Victim Loses a Tangible Job Benefit

The Bank argues that "harassment which is unrelated to any loss or threatened loss of tangible job benefits cannot give rise to a Title VII claim." Bank Br. at 14. There is no basis in the language or legislative history of Title VII for such a restrictive reading of the statute, and the Bank admits that no Circuit Court has expressly held that the loss of tangible job benefits is a prerequisite for a Title VII action. Id. at 35. In fact, every Circuit Court that has considered the issue has held that sexual harassment in the workplace falls within the scope of discrimination with respect to "terms, conditions, or privileges of employment" regardless of whether the victim loses a tangible job bene-

fit. Easter, 750 F.2d at 523; Katz, 709 F.2d at 255-56; Henson, 682 F.2d at 904; Bundy, 641 F.2d at 948.

Thus, in Bundy, where the district court had found that "the making of improper sexual advances to female employees [was] standard operating procedure, a fact of life, a normal condition of employment," the Court of Appeals found the employer liable for sexual harassment regardless of whether the plaintiff proved that she had been denied a tangible job benefit. 641 F.2d at 939, 948.

The EEOC Guidelines specifically provide that sexual harassment which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment" violates Title VII. 29 C.F.R. § 1604.11(a)(3) (1985). These Guidelines

are entitled to "great deference," see discussion supra, especially since the EEOC has repeatedly and consistently interpreted Title VII as obligating an employer "maintain a working atmosphere free of intimidation based upon race, color, religion, sex or national origin."[51/] See, e.g., EEOC Decision No. 72-1561, 4 Fair Empl. Prac. Cas. 852 (BNA) (1972).

The EEOC and the United States in their amici curiae brief agree that, even absent the loss of a tangible job benefit, sexual harassment violates Title VII. EEOC Brief.

In the analogous case of racial, religious or ethnic harassment, the courts have long held that such conduct violates

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51/ The EEOC Guidelines note that "[t]he principles involved here continue to apply to race, color, religion or national origin." 29 CFR § 1604.11(a) n.1 (1985).

Title VII if it creates a hostile working environment.[52/] See, e.g., Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982) (automobile dealer violated Title VII by subjecting black trainee to atmosphere of repeated ethnic slurs); Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1980) (Arkansas National Guard violated Title VII by subjecting black employee to an atmosphere heavily charged with racial prejudice); Weiss, 595 F. Supp. at 1053, 1057 (employer violated Title VII where Jewish employee was subjected persistently to offensive religious slurs such as "Christ killer" by supervisor and coworker).

52/ If the offensive behavior is not directed to the employee because of his race, religion, national origin or sex, then the behavior, no matter how offensive, does not constitute discrimination. See Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982).

Although the courts have generally spoken in terms of "quid pro quo" (denial of a tangible benefit) and "environmental" (no denial of a tangible benefit) sexual harassment, those categories are not distinct; instead, they are part of a continuum. As the Eleventh Circuit noted in Henson, 682 F.2d at 908, n. 18, "on a practical level, of course, there are many cases that could be characterized interchangeably as condition of work or quid pro quo work."53/

It is impossible to draw a clear line between conduct that has a "tangible job effect" and conduct that does not. In many cases, courts have found that pervasive sexual harassment had so detrimentally affected an employee's well-be-

53/ In its Brief, the Bank notes tht many of the "environmental" sexual harassment cases also had quid pro quo aspects. Bank Br. at 35, n.13.

ing that it amounted to a constructive discharge. See, e.g., Easter, 750 F.2d at 523; Coley, 561 F. Supp. at 651. Here, Vinson contends that she was constructively discharged by Taylor's sexual harassment.54/

As demonstrated in detail, supra, in Part ID, sexual harassment impairs women's job performance, reduces their productivity and harms their physical and psychological health. As a result, sexual harassment, whether or not linked to the loss of a specific tangible job benefit, has serious economic consequences for both the employees and their employers.55/

54/ Testimony of M. Vinson, Tr. Jan. 23, 1980 at 64.

55/ The U.S. Merit Study, supra n. 7, at 14, conservatively estimated the cost of sexual harassment to the Federal Government at approximately $90 million per year. The greatest costs were due to re-
(footnote continued)

It is especially difficult to draw a distinction where the harasser is a supervisor who has the power to influence an employee's advancement and work assignments, whether or not he explicitly links sexual cooperation to a tangible job benefit. See discussion, supra, pp. 20-21. Whether conduct is termed "quid pro quo" or "environmental" may depend on the harasser's subtlety. Since women are heavily dependent on their job (see discussion, supra, pp. 22-24), even a subtle advance, especially from a supervisor, may leave an employee no choice but to

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(footnote continued from previous page) duced productivity, but other costs included job turnover, emotional stress and absenteeism. Id. More than two-thirds of the executives responding to the Harvard Study were concerned that sexual harassment might lead to losing trained and valuable employees who either quit or were fired, and nearly two-thirds said that sexual harassment could hurt efficiency by distracting people or causing dissension. Safran, supra n.6, at 47.

submit or leave the job. Moreover, if the loss of a tangible job benefit was a prerequisite to a claim for sexual harassment, "an employer could harass a female employee with impunity by carefully stopping short of firing the employee or taking other tangible actions against her . . . " Bundy, 641 F.2d at 945.

In any event, the denial of tangible job benefits is not the only barrier women, blacks and other minorities face to equal employment opportunity. Hostility and discriminatory behavior from supervisors and fellow workers because of an employee's race, religion, national origin or sex, in and of itself, may pose an insurmountable barrier to equal employment opportunity. To meet the mandate of Title VII, it is not sufficient for an employer grudgingly to admit such indi-

viduals to positions formerly closed to them while turning a blind eye to the daily indignities and insults they suffer at work from hostile supervisors and co-workers. See Katz, 709 F.2d at 254 ("[s]exual harassment erects barriers to participation in the workforce of the sort Congress intended to sweep away by the enactment of Title VII"). Otherwise, women, blacks and other minorities would be forced to endure a substantial burden that white men need not suffer.

The Bank disingenuously argues that sexual harassment should be treated differently from racial, religious and ethnic harassment, which it says is never acceptable,[56] whereas sexual activity

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[56] The fallacy of this distinction is evident from the fact that religious proselytizing, protected by the First Amendment, may violate Title VII if a supervisor attempts to convert an employee on the job. EEOC Decision No.

(footnote continued)

between employees may be "socially acceptable or even desirable."[57] Banks Br. at 10. The Bank's distinction contravenes the express Congressional directive that sex discrimination "be accorded the

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(footnote continued from previous page)
72-1114, 4 Fair Empl. Prac. Cas. (BNA) (1972). See also Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (employer violated Title VII by requiring employees' attendance at religious exercises during staff meetings). Moreover, the lower courts and the EEOC have made clear that an occasional racial or ethnic slur is not sufficient to violate Title VII. See, e.g., Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977) (supervisor's casual reference to Italian-American as "dago" and to other Italian employees as the "Mafia" in casual conversation did not violate Title VII).

[57] The premise underlying the Bank's position, that sexual harassment is an expression of natural sexual attraction is simply wrong. The U.S. Merit Study supra, n. 7 at 101, flatly rejected that theory, noting, among other things, that many offenders harassed more than one victim, that victims reported severe consequences and that the respondents almost unanimously agreed that sexual harassment is not something that "people should have to put up with."

same degree of social concern given to any type of unlawful discrimination." See discussion, supra, pp. 40-41. As the Eleventh Circuit stated in Henson, 682 F.2d at 902:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Moreover, contrary to the Bank's suggestion, what Title VII prohibits is not sexual activity but sexual harassment.[58/] Sexual activity which is not harassing is not prohibited by Title VII.

58/ In his dissent, Judge Bork acknowledged that sexual harassment is "reprehensible" conduct. Vinson, 760 F.2d at 1333, n.7.

The touchstone of the EEOC Guidelines is that the conduct be "unwelcome" and not that it be "socially unacceptable." Behavior which is intimidating, degrading and offensive to women should not be immunized from the purview of Title VII simply because some men find it socially acceptable[59/] any more than derogatory epithets used about blacks should be immunized because some whites find them "socially acceptable." See Walker, 684 F.2d at 1359 (Title VII violated where manager of trainee program had told black trainee that racial slurs were "just something a black man would have to dea with in the South"); Murry v. American Standard, Inc., 373 F. Supp.

59/ Some men may find sexually harassing conduct acceptable because of stereotyped views of women. This Court has repeatedly condemned "the baggage of sexual stereotypes." Califano v. Westcott, 443 U.S. 76, 89 (1979).

716 (E.D. La.), aff'd, 488 F.2d 529 (5th Cir. 1973) (Title VII violated where male black employee was called "boy").

Under Title VII and the EEOC Guidelines, whether a woman has been sexually harassed is an issue of fact.60/ As this Court has recognized, "the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." U.S. Postal Service Board of Governors v. Aikens, 460

60/ Certain conduct is presumptively offensive; for example, making sexual cooperation a prerequisite for job advancement, rape or exposing one's genitals or buttocks. See, e.g., McKinney, 765 F.2d at 1132, Zabkowicz, 589 F. Supp. at 782. See also Katz, 709 F.2d at 254 (where the sexual harassment took form of extremely vulgar and offensive sexually related epithets, the court recognized that the words used were "intensely degrading").

U.S. 711, 716 (1983). In the nearly ten years since sexual harassment was first recognized as actionable under Title VII, the district courts have proven capable of distinguishing desired and inoffensive sexual behavior from sexual behavior which is coercive, intimidating and degrading.61/

In this case, Vinson testified that the Bank's Branch Manager, Taylor, fondled her breasts and buttocks and exposed himself to her, and also offered testimony that he made similar advances to other female employees.62/ These assertions, if credited, are sufficient to state a prima facie case for sexual ha-

61/ Every day triers of fact determine whether sexual activity was consensual in rape and sexual abuse cases.

62/ The Court of Appeals found that the District Court had erred in denying Vinson the opportunity to demonstrate that Taylor sexually harassed other employees. Vinson, 753 F.2d at 146.

rassment, even if enduring those actions was the only detriment the employee suffered. As we discuss below, since the District Court made no findings of fact as to these allegations, the case must be remanded.

C. The Court of Appeals Correctly Remanded this Case

The Court of Appeals remanded this case principally because the District Court had not determined whether Taylor "created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." Vinson, 753 F.2d at 141 (quoting Bundy, 641 F.2d at 943-44) (emphasis in Vinson). It is certainly not surprising that the District Court failed to make such a determination in its decision, dated February 26, 1980,

before the preliminary EEOC Guidelines had been published and nearly a year before Bundy was decided. The Court of Appeals correctly remanded this case for reconsideration in light of the controlling legal standards enunciated in Bundy. See Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).

Moreover, the Court of Appeals correctly found that the district court's findings of fact were not sufficient to indicate the basis of its decision. At a minimum, a finding of fact must provide enough detail to disclose how the court arrived at its conclusion of the factual issue. Vinson, 753 F.2d at 145, n.32. See Kelley v. Everglades Drainage Dist., 319 U.S. 415, 422 (1943); Mozee v. Jeffboat, Inc., 746 F.2d 365, 370 (7th Cir. 1984); Anderson v. City of Albuquerque, 690 F.2d 796, 803 (10th Cir. 1982). A

conclusory statement is not sufficient. Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381, 1386 (5th Cir. 1983).

Here, the District Court's findings of fact were conclusory. It found:

> If the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with Capital, that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at Capital or her advancements or promotions at that institution. 23 Fair Empl. Prac. Cas. at 43.

The District Court failed to issue any findings as to the existence of a sexual relatonship between Vinson and Taylor or as to whether Taylor had done any of the sexually harassing acts about which Vinson had testified.63/

63/ The District Court clearly did not credit Taylor's testimony because then it would have been unnecessary to address
(footnote continued)

The Court of Appeals recognized that it is impossible to determine from these findings whether Taylor sexually harassed Vinson:64/

> whether the court meant that in the legal sense Vinson was not victimized -- because her situation did not qualify under Barnes, or because her relationship with Taylor was thought to be voluntary -- or whether the statement was intended as the ultimate resolution of the conflicting evidence on Taylor's behavior toward Vinson. 753 F.2d at 145, n.32 (citations omitted).

(footnote continued from previous page) the "voluntary" nature of Vinson's actions. The Court of Appeals noted what the Court meant by the term "voluntary" was unclear. 753 F.2d at 146, n.36. As discussed, supra, the touchstone for a violation of Title VII is that the behavior be unwelcome.

64/ In fact, the District Court's findings as to "quid pro quo" sexual harassment are similarly suspect. The court made no finding as to whether Taylor had threatened to fire Vinson in order to coerce her into having sexual relations with him. If she capitulated to his advances in order to retain her job, she has a claim for "quid pro quo" sexual harassment.

Thus, in light of the controlling principles of law first enunciated in Bundy, and the paucity of the District Court's findings of fact, the Court of Appeals correctly remanded this case for reconsideration.

Conclusion

For the reasons stated above, the decision of the United States Circuit Court for the District of Columbia should be affirmed.

Respectfuly submitted,

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February 11, 1986

APPENDIX

Amicus Working Women's Institute is a New York not-for-profit corporation, founded in 1975, to serve as a national research, training and consultation center, focusing specifically on the problem of sexual harassment faced by working women. The Institute has done ground-breaking research on the extent of sexual harassment in employment and its impact on women's employment opportunities, job performance and health. A leader in the fight against sexual harassment, it is the only national organization with a complete program devoted to investigating and developing ways to overcome this problem.

Amicus Committee Against Sexual Harassment is a Sacramento, California organization devoted to education on the issue of sexual harassment on the job.

Amicus Connecticut Women's Educational and Legal Fund ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1971, CWEALF has represented women in numerous cases including those involving sexual harassment. Amicus Women's Rights Committee of the New York County Lawyers' Association is a committee of lawyers concerned about the legal rights of women, including the right to be free of sex discrimination in employment.

Amici New York State Committee on Pay Equity, and Women on the Job of Port Washington, New York, are organizations devoted to eliminating sex discrimination in employment.

Amicus Women's Alliance for Job Equity of Philadelphia, Pennsylvania has a Sexual Prevention Program which aids victims of sexual harassment and assists businesses in preventing sexual harassment.

Amicus Women In Self-Help (WISH) of the New York State Displaced Homemaker Program provides employment services for displaced homemakers.

Amici New York Women Against Rape (NYWAR) and the Women's Counseling Project provide crisis counseling for

women, including women who have been sexually harassed.

Amicus Non-Traditional Employment for Women (NEW) is an eight-year old organization dedicated to providing employment training to poor women who are interested in blue collar work and other work not traditionally performed by women. NEW is especially concerned because sexual harassment is a practice which deters women from non-traditional jobs.

Amicus Sisterhood of Black Single Mothers is an eleven-year-old Brooklyn-based self-help network for black single mothers which is particularly concerned with employment discrimination against black women, including sexual harrasment.

Amicus Women's Rights Project of the Instituto Puertorriqueno de Derechos Civiles is a project developed to combat discrimination against women in Puerto Rico, including employment discrimination and sexual harassment, through education and litigation.

Amicus Workers Defense League is a non-partisan human rights organization which since 1936 has defended and advocated workers rights, including the right to be free of discrimination in employment.